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NO. [redacted] 223

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

CHARLES BAKER, et al.,

Petitioners,

vs.

F & F INVESTMENT CO., et al.,

Respondents.

SIDNEY CLARK, et al.,

Petitioners,

vs.

UNIVERSAL BUILDERS, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

WILLIAM R. MING, JR.
ALDUS S. MITCHELL
128 W. Madison Street
Chicago, Illinois 60602

THOMAS J. BOODELL, JR.
5757 S. Woodlawn
Chicago, Illinois 60637

THOMAS P. SULLIVAN
JOHN G. STIFLER
DAVID C. ROSTON
135 S. LaSalle Street
Chicago, Illinois 60603

Attorneys for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgments of that Court entered on January 6, 1970, which affirmed an interlocutory ruling of the District Court that the Illinois five-year statute of limitations applies to the federal civil rights claims asserted by petitioners.

Opinions Below

These two civil rights cases were considered on a consolidated basis in the courts below, insofar as the issue presented here is involved. The opinion of the Court of Appeals for the Seventh Circuit is reported at 420 F. 2d 1191 (attached as Appendix A). The opinion of the District Court for the Northern District of Illinois is reported at 300 F. Supp. 210 (attached as Appendix B). A prior decision of the District Court allowing these cases to proceed as class actions is reported at 1969 CCH Trade Cases ¶72,754 (attached as Appendix C).

Jurisdiction

The decision of the Court of Appeals sought to be reviewed here was entered on January 6, 1970. That decision was entered in respondents' appeals and petitioners' cross appeals. Only respondents petitioned for rehearing *en banc*, and that petition was denied by the Court of Appeals on March 5, 1970. Petitioners' motion to extend the time within which to file their petition for writ of certiorari until June 5, 1970 was granted by Mr. Justice Marshall on April 8, 1970, without prejudice to the Court's consideration of whether the motion had been filed in time.* This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254. The cases arise under Section 2 of the 1866 Civil Rights Act (42 U.S.C. § 1982).

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*The delay in postal delivery of petitioners' motion to the Clerk of this Court (mailed April 1, 1970) should not be taken as making the filing untimely, since it was undoubtedly due to the disruption following the postal strike, and since it did not prejudice respondents whose time to file a petition for writ of certiorari to review the judgment in their appeals did not expire until June 3, 1970. Respondents in *Clark* filed a petition with this Court on June 1, 1970.

QUESTIONS PRESENTED

1. Whether varying state statutes of limitations may properly be used to deny some Negroes federal judicial relief in securing rights guaranteed by the Constitution and laws of the United States.

2. Whether Section 3 of the 1866 Civil Rights Act (42 U.S.C. § 1988) prohibits the application of an Illinois five-year statute of limitations to petitioners' federal civil rights claims.

3. Whether the uniform federal doctrine of laches rather than varying state limitations periods should govern the timeliness of federal civil rights actions.

4. Whether the application of an Illinois statute of limitations to the civil rights claims asserted here violates petitioners' rights under the Fifth and Fourteenth Amendments to the United States Constitution.

STATUTES INVOLVED

Section 2 of the 1866 Civil Rights Act (now 42 U.S.C. § 1982) provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The Rules of Decision Act (28 U.S.C. § 1652) provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Section 3 of the 1866 Civil Rights Act (now 42 U.S.C. Section 1988) provides in part:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . ."

Statement of the Case

These two related cases are being prosecuted by approximately 4,000 Negroes who seek a remedy to secure their federal civil rights. Each case has been brought as a class action on behalf of Negro homeowners on the West and South Sides of Chicago who purchased real estate by means of instalment land contracts from real estate speculators. The *Baker* case involves used residential property on the West and South Sides of Chicago which was allegedly sold through "blockbusting" and "panic peddling" tactics employed by respondents to frighten white owners from their neighborhoods. The *Clark* case involves new homes, most of which are located on the South Side of Chicago in areas which are practically all Negro-occupied.

The complaints in these cases (which are to be taken as true for the purpose of this appeal) charge respondents with having violated petitioners' civil rights by charging them prices for homes far in excess of those that would

have been charged white persons.* Petitioners claim that respondents took advantage of the artificial scarcity of residential housing created by *de facto* racial segregation to require petitioners to pay prices for residences far in excess of their fair market value. Respondents are alleged to have collected from petitioners what is, in practical effect, a "race tax" in their purchases of homes for themselves and their families.

Petitioners seek to have the instalment land contracts declared void and to have respondents ordered to return all monies paid them, less a non-discriminatory rental. In the alternative, petitioners request that the provisions of the contracts be reformed so as to reflect a fair, non-discriminatory price and to delete the unconscionable provisions. Petitioners further seek to enjoin respondents from taking action to forfeit the contracts or evict them from their homes, and to revoke all federal, state and municipal licenses held by respondents. Petitioners also claim punitive damages by reason of the willful and malicious character of respondents' acts.

The District Court applied an Illinois five-year statute of limitations to these claims, and held that the statute commenced to run as to each member of the plaintiff classes on the date his instalment land contract terminated. Respondents in both cases sought interlocutory review in the Court of Appeals, and after they obtained permission

*In sustaining the complaints in these cases, the District Court ruled that petitioners had stated a claim under 42 U.S.C. § 1982 and did not reach the question of whether petitioners also stated sufficient claims under the Thirteenth and Fourteenth Amendments to the United States Constitution and under Sections 1981, 1983, and 1985(3) of Title 42 U.S.C. (300 F.Supp. at 216; App. 24.)

to appeal, petitioners cross-appealed. Respondents contended in the Court of Appeals that the Illinois statute should commence to run at the time the contracts were signed by the parties. Petitioners contended that no state statute should be applied to federal civil rights claims and that no limitations period should bar any of petitioners' actions.* In the alternative petitioners claimed that the federal doctrine of laches should apply.

The Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court in its entirety. The court rejected petitioners' contentions that the Rules of Decision Act and Section 1988 of Title 42 U.S.C. prohibit application of varying state limitations periods to rights arising under the United States Constitution and Civil Rights Acts.

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* As to certain members of petitioners' classes, the cross appeals are not interlocutory, but are appeals from a final order of dismissal pursuant to Federal Rule 12(b)(6).

REASONS FOR GRANTING THE WRIT

The decision below will result in a patchwork application of varying limitations periods to fundamental federal civil rights claims. By mechanically applying the ruling of this Court in *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914), the Court of Appeals ignored the force of several recent decisions of this Court which have emphasized the need for uniformity in adjudicating federal claims. The Court of Appeals also misapprehended the force of Section 3 of the 1866 Civil Rights Act (42 U.S.C. § 1988), which permits federal courts to apply state law only when it will aid a plaintiff in maintaining a civil rights claim; otherwise, federal law must be used. It is time for this Court to review its early decision in *O'Sullivan* v. *Felix* and decide squarely whether limitations periods of the several states should be utilized to bar Negroes from vindicating their federal civil rights.

This Court's examination of *O'Sullivan* v. *Felix* will require an evaluation of the interplay of the Rules of Decision Act and Section 1988 of Title 42 U.S.C. Petitioners contend that present implementation of the Rules of Decision Act by this Court makes it clear that the broad language of *O'Sullivan* v. *Felix* should be overruled. This is even more clear in civil rights cases where the specific language of § 1988 directs courts to apply that law (state or federal) which permits civil rights claims to survive. The clear implication of federal decisions since *O'Sullivan* v. *Felix*, and the express language of Section 1988 (which was not considered by this Court in *O'Sullivan*), makes this the proper time to consider the role which state limitations statutes should play in governing or limiting civil rights claims arising under federal law.

1. The decision below would sanction the application of varying state statutes of limitations to bar federal claims for violation of civil rights.

Petitioners' claims are founded squarely upon the federal Civil Rights Acts and the constitutional provisions which those Acts implement. It is wholly inconsistent with the national policy manifested by those Acts to allow the various states to bar their judicial enforcement by the application of differing limitations periods. The rationale of the opinion below emasculates basic rights guaranteed by the United States Constitution and statutes.

Any analysis of whether state law should play any part in determining federally-guaranteed civil rights begins with the Rules of Decision Act. While that Act generally provides that the laws of the states are to apply to civil actions in federal courts, it contains an express exception "where the Constitution . . . of the United States or Acts of Congress otherwise require."

The decision of the court below turns upon an interpretation given to the Rules of Decision Act by this Court in *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914). *O'Sullivan* was an action for damages brought under the 1871 Civil Rights Act (now 42 U.S.C. § 1985 (3)). The question presented was only "whether the action [battery] is for damages or for penalty". (233 U.S. at 322.) If a penalty, the applicable limitations statute was five years; if for damages, the period was one year. This Court, in applying the shorter statute, commented (*ibid*):

> "That the action depends upon or arises under the laws of the United States does not preclude the application of the statute of limitations of the State is established beyond controversy by cases cited by the Circuit Court and by *McLaine* v. *Rankin*, 197 U.S. 154, 158."

The plaintiff in *O'Sullivan* did not argue that under § 1988 no state statute of limitations should apply:

Prior to the *O'Sullivan* decision this Court recognized the important exception contained in the Rules of Decision Act for federal question cases. In the *Virginia Coupon Cases*, 114 U.S. 269, 303 (1884), this Court said:

> "Rev. Stat. § 721 [the Rules of Decision Act], it will be observed, makes an express exception, in reference to the adoption of State laws as rules of decision, of cases where the Constitution otherwise requires, which it does wherever the adoption of the State law deprives a complaining party of a remedy essential to the vindication of a right, and that right is derived from or protected by the Constitution of the United States."

Here, civil rights derived from the United States Constitution are unquestionably involved. The decision in the *Virginia Coupon Cases* emphasizes that it is in precisely this situation that the Rules of Decision Act requires application of federal law. The Court of Appeals in the decision below considered this proposition, but rejected it in light of the *O'Sullivan* ruling which it felt was controlling. (420 F.2d at 1192-93; App. 3.)

Since the *O'Sullivan* decision, this Court has taken an expanded view of the nature and function of federal law. This is particularly true where federal laws have grown out of federal regulatory legislation. This Court has ruled that there are many federal statutes and causes of action which are to be governed by uniform federal rules. Examples are: *Billings* v. *United States*, 232 U.S. 261, 286 (1914) (interest on judgment for unpaid taxes); *Carpenter* v. *Shaw*, 280 U.S. 363, 367-68 (1930) (effect of language in treaties); *Awotin* v. *Atlas Exchange National Bank of Chicago*, 295 U.S. 209, 213-14 (1935) (remedy for violation of National Banking Act); *Lyeth* v. *Hoey*, 305 U.S. 188, 193-94 (1938) (federal income taxes); *Royal Indemnity Company* v. *United States*, 313 U.S. 289,

296 (1944) (interest on federal obligations); *Clearfield Trust Company* v. *United States*, 318 U.S. 363 (1943) (obligation of the United States on commercial paper); *Jerome* v. *United States*, 318 U.S. 101, 104-05 (1943) (federal criminal laws).*

The Reconstruction Congress clearly intended to create substantial federal rights when it passed the Civil Rights Acts. Indeed, those Acts were perhaps the first federal legislative regulations. The legislative history discloses unmistakably that it was existing state law, the conduct of state officials and acts of other persons to deny federal rights that impelled Congress to enact the Civil Rights Acts. Having enacted these remedial Acts to overcome discriminatory state laws, the lawlessness of state officials and individuals in the several states, the framers hardly could have intended narrow state doctrines to limit federal rights.** In light of the legislative history, it does violence to logic to suggest that the framers intended that federal

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* The only recent case in which this Court has applied a state limitations period to bar an action brought in a federal court is *United Autoworkers* v. *Hoosier Corp.*, 383 U.S. 696 (1966). The rationale of that case supports petitioners' position. There, Section 301 of the Labor Management Relations Act was under consideration. That section establishes no rights. Instead it merely provides that parties to collective bargaining agreements may sue for breach of contract in the federal courts. The rights, if any, arise under state law from the contracts themselves and thus, unlike the situation here, no federal statutory substantive right is asserted.

** This Court frequently has placed special emphasis on the legislative history of the Civil Rights Acts in order to determine their interpretation and application. *E.g.*, *Slaughter-House Cases*, 16 Wall. (83 U.S.) 36, 70 (1872); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968); *City of Greenwood* v. *Peacock*, 384 U.S. 808, 815-23 (1966); *Monroe* v. *Pape*, 365 U.S. 167, 171-85 (1961).

courts blindly apply state statutes of limitations to bar judicial enforcement of federal rights.*

The decision of the court below compounds this error by fashioning a rule which the State of Illinois itself would not follow.** The court applied a five-year "catch all" provision but refused to consider whether Illinois itself would apply that limitations period. The court held that it would not decide whether Illinois would apply a state doctrine of laches because the application of laches is "a matter of federal and not state law." (420 F. 2d at 1193 n. 3; App. 2.) The court should have considered whether federal courts would adopt a state statute of limitations where the statute would not be applied under state law.

In light of the more recent decisions of this Court, and the anomalous result reached by the court below, this Court should reconsider the *O'Sullivan* ruling and determine whether varying state statutes of limitations should govern the availability of federal judicial remedies in aid of federal civil rights claims.

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* On December 19, 1865, the South Carolina legislature adopted a statute establishing separate courts for actions involving "persons of color." Under Section 34 of that statute, tort actions involving Negroes were required to be brought within three months after the cause of action arose, actions on oral contracts within six months, and actions on written contracts within one year. In contrast, the statutory period for white South Carolina citizens, for most torts and on oral and written contracts, was four years (No. 4732, Sec. XXXIV, 1865 S. Car. Stat. 287-88). It is precisely this type of invidious state law which the Civil Rights Acts were designed to abolish.

** If these cases had been brought in the Illinois state courts, their timeliness would be determined under the Illinois doctrine of laches. *E.g., Bremer* v. *Bremer*, 411 Ill. 454, 468 (1952); *McDiarmid* v. *McDiarmid*, 368 Ill. 638, 642 (1938); *Highway Insur. Co.* v. *Korman*, 40 Ill. App. 2d 439, 453 (1963). If petitioners are correct that Illinois would apply laches, then there is no state limitations period applying to these actions.

2. Section 3 of the 1866 Civil Rights Act (now 42 U.S.C. § 1988) requires that federal law be applied in this case, not an Illinois "catch all" statute.

It is even more clear that federal law should apply to these cases when it is recognized that petitioners' claims arise not only from federal constitutional amendments, but from the 1866 Civil Rights Act. Section 3 of that Act (now 42 U.S.C. § 1988) requires that courts in applying the provisions of that Act first look to the laws of the United States and apply them "so far as such laws are suitable to carry [those laws] into effect". Only in the event that the court finds federal laws "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies" is the court to look to state law. But the court is directed to use state law only if "the same is not inconsistent with the Constitution and laws of the United States". Application of §1988 to the cases at bar requires the following result:

(1) Federal law provides no statute of limitations applicable to petitioners' causes of action. Therefore, use of federal law will enable the federal court to afford a remedy to all petitioners.

(2) Illinois law, as interpreted and applied by both courts below, permits imposition of a five-year statute of limitations (Ch. 83, § 16, Ill. Rev. Stat., 1969), which will bar the federal court from affording a remedy to some of the petitioners.

(3) Accordingly, since federal law is suitable to afford all of the petitioners a remedy, and since state law is not, federal law controls. Petitioners' action is subject either to no limitation period (*cf. Hauenstein v. Lynham*, 100 U.S. 483; 488 (1880)), or only to the federal doctrine of laches (see Part 3, below). Such a result is wholly consistent with this Court's recent opinion in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), in which this Court permitted recovery of damages in a §1982 civil rights action and utilized the language of Section 1988 to achieve this result.

Section 1988 negates any attempt to read the Rules of Decision Act narrowly. The Court of Appeals in its opinion below misapprehended the weight to be given to Section 1988; and instead said that it was "... reluctant to construe Section 1988 so broadly in the face of the well-settled practice of adopting state limitations periods for federal law." 420 F. 2d at 1196; App. 7a. Section 1988 underscores the importance of the federal rights involved —civil rights— and makes it clear that the exception found in the Rules of Decision Act should be read to permit broad redress.

This Court should re-examine the interpretation given the Rules of Decision Act in *O'Sullivan* v. *Felix* in light of Section 1988. Re-examination is particularly appropriate where, as here, a statute not previously considered (§1988) is brought to this Court's attention to assist it in interpreting decisional law. In such an instance, this Court can ignore a previous decision decided without the benefit of consideration of that statute. *Compare Kenishian* v. *Board of Regents*, 385 U.S. 589, 594-95 (1967).

3. This Court should require application of the doctrine of laches to these actions seeking equitable relief.

Federal claims which are within the exclusive jurisdiction of equity are governed by the doctrine of laches. Independent of any other reasons, and irrespective of the Rules of Decision Act, petitioners' claims fall within the well-recognized doctrine that federal equity claims are barred only by laches.

Russell v. *Todd*, 309 U.S. 280 (1940), sets forth the rule to be applied in these cases. There, the plaintiffs brought action in the federal district court in New York under a federal statute (12 U.S.C. § 812) to impose liability for the

bank's debts to the shareholders of a joint stock land bank. This Court held that the doctrine of laches, not the state statute of limitations, was applicable to the case (309 U.S. at 287, 289):

> "The Rules of Decision Act does not apply to suits in equity."
>
> ". . . [W]here the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are inapplicable, and in the absence of any state statute barring the equitable remedy in like cases, the federal court is remitted to and applies the doctrine of laches as controlling."

In *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), this Court again applied the rule set out in *Russell*, holding that state statutes of limitations were inapplicable to actions based upon federally created rights within the exclusive jurisdiction of equity (327 U.S. at 395-96):

> ". . . We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.
>
> "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief."

The Court of Appeals did not apply the *Russell* and *Holmberg* doctrine here because it felt that petitioners' claims are not exclusively equitable in nature. (420 F.2d at 1193; App. 2.) Yet, the alternative remedies sought by these petitioners are reformation and rescission—both of which

are purely equitable in nature. Such actions have always been considered to be within the exclusive jurisdiction of equity. See 1 J. Pomeroy, *Equity Jurisprudence* § 138 (5th ed. 1941). Petitioners' requests are (1) that the contracts executed by them be declared unenforceable (requiring rescission), or (2) that the contracts be adjusted to remove the discriminatory and unconscionable provisions (requiring reformation). Petitioners also seek equitable relief to enjoin respondents from evicting them and to revoke respondents' real estate licenses. This relief is sought not only on behalf of petitioners, but thousands of class members. To the extent that petitioners request money damages, these claims are dependent upon and arise solely from prior reformation of the contracts. These cases are, accordingly, within the exclusive jurisdiction of a court of equity and should be governed by the federal rule of laches. The Seventh Circuit's contrary conclusion evidently resulted from the lack of guidance provided to lower federal courts required to determine whether a claim is exclusively equitable in nature.

There may be instances where the facts giving rise to a claim under Section 1982 call for application of a short limitations period. But a short limitations period should be applied, not because it is contained in state law, but because in fairness to the legitimate interests of the parties, it is proper. That is the crux of the matter. The federal doctrine of laches should be applied so that only those claims which can be shown by respondents to be prejudicial are defeated—not by the application of an arbitrary time standard, but on the merits.

4. The application of a short limitations period would violate petitioners' rights to due process and equal protection of the laws.

Although the Civil Rights Acts were passed over a century ago, not until this Court's 1968 decision in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) were these Acts interpreted to encompass the causes of action asserted here. *Jones* v. *Alfred H. Mayer Co.* recognized for the first time a civil right of action against private individuals by persons injured by violations of Section 1982. Before *Jones*, in *Virginia* v. *Rives*, 100 U.S. 313, 317-18 (1880) and *Hurd* v. *Hodge*, 334 U.S. 24, 31 (1948), the Court had indicated in *dicta* that no such right of action could be maintained. That language from *Hurd* was disavowed in *Jones*. (392 U.S. at 443 n. 78.)

Accordingly, until 1968, it appeared that there was no federal equitable remedy available to petitioners against respondents under the United States Constitution or Civil Rights Acts for rescission or reformation of their instalment land contracts. Under these circumstances, it cannot be said that petitioners slept on their rights in not bringing this action before January, 1969. It would be grossly unjust to bar this action by reason of passage of time, particularly where there is no showing that harm has resulted to respondents.

In the absence of a showing of prejudice to respondents, the statute of limitations defense is a technicality, pure and simple. It is anomalous to declare that a federal civil right first judicially recognized in June, 1968 is barred when asserted in January, 1969. It would be unjust and a violation of the due process clauses of the Fifth and Fourteenth Amendments if that defense were upheld as to any member of the petitioners' class. The courts themselves would be implementing an unjust discrimination. *Cf. Shelly* v. *Kraemer*, 334 U.S. 1 (1948).

The courts and most of the legal community had long denied the existence of the remedy which petitioners seek. This Court has decided that such a remedy is available to secure civil rights. To permit the remedy to some black citizens and not others is inconsistent with the national policy manifested by the Thirteenth and Fourteenth Amendments to the United States Constitution.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be granted so that this Court may re-examine its decision in *O'Sullivan* v. *Felix* and decide whether varying state limitations statutes should bar Negroes from securing their federal civil rights.

Respectfully submitted,

WILLIAM R. MING, JR.
ALDUS S. MITCHELL
123 West Madison Street
Chicago, Illinois 60602

THOMAS J. BOODELL, JR.
5757 South Woodlawn
Chicago, Illinois 60637

THOMAS P. SULLIVAN
JOHN G. STIFLER
DAVID C. ROSTON
135 South La Salle Street
Chicago, Illinois 60603

Attorneys for Petitioners

June 5, 1970

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

January 6, 1970

OPINION

CUMMINGS, Circuit Judge:

These consolidated appeals concern statute of limitations rulings of the district court with respect to two related class actions brought by Negro purchasers of new and used residential real estate in Chicago. The purchases were on installment contracts allegedly containing terms less favorable to Negroes than would have been available to whites. Count I of each complaint was based principally on Section 1982 of the Civil Rights Act of 1866 (42 U.S.C. § 1982), as construed in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189. Count II of the *Baker* complaint alleged violations of the federal antitrust laws, and Count III of the *Baker* complaint alleged violations of the Illinois antitrust laws.[1]

The district court held that the Illinois 5-year statute of limitations governing civil actions not otherwise provided for (Ill.Rev.Stat. (1967) ch. 83, § 16) is applicable to Count I of both complaints and that the 4-year statutes of limitations contained in the federal and Illinois antitrust laws (15 U.S.C. § 15b and Ill.Rev.Stat. (1967) ch. 38, § 60-7) are respectively applicable to *Baker* Counts II and

[1] Since the court below held that plaintiff stated a claim for relief under Section 1982, it did not pass upon the motions to dismiss as to violations of Sections 1981, 1983 and 1985(3) of the Civil Rights Act and of the Thirteenth and Fourteenth Amendments to the Constitution of the United States, nor do we. Motions to dismiss were sustained as to other Counts of both complaints. Those Counts are not involved in this appeal.

III. However, the court held that the statutes of limitations run from the date the real estate installment contracts terminate rather than from the date they were executed, as defendants had contended. Accordingly, the court concluded that the plaintiff classes must be redefined to eliminate the purchasers whose contracts terminated prior to the periods of limitations.[2] Defendants have brought interlocutory appeals from the district court's decision and plaintiffs were given leave to cross appeal. These interlocutory and cross appeals require us to decide whether the doctrine of laches is applicable. If not, we must determine what statutes of limitations, if any, are applicable to Counts I of each complaint and to *Baker* Counts II and III, and when they began to run.

The Doctrine of Laches Is Inapplicable.

As to Count I based on the Civil Rights Act, plaintiffs and the United States as *amicus curiae* urge that the claims are governed by laches rather than by the statutes of limitations. They would be correct if the claims were solely equitable. Russell v. Todd, 309 U.S. 280, 60 S.Ct. 527, 84 L.Ed. 754; Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743. However, the complaints seek money damages, both actual and punitive, and cannot be deemed exclusively equitable. Therefore, as we recently held in Morgan v. Koch, 419 F.2d 993 (7th Cir., 1969), the doctrine of laches does not apply to the Count I claims.[3]

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[2] The opinion of the district court is reported at 300 F.Supp. 210.

[3] It is unnecessary to consider the Illinois laches cases cited by plaintiffs. The applicability of the doctrine of laches to actions in federal courts based on federally created causes of action is a matter of federal and not state law. We need not decide the extent to which federal courts should follow state decisions where the doctrine is applicable.

State Statutes of Limitations Apply to Federal Civil Rights Actions.

Despite long settled rulings to the contrary, plaintiffs assert that no state statute of limitations bars federal civil rights actions. Ever since the 1915 decision of the Supreme Court in O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980, the courts have uniformly held that state limitations statutes are to be applied to federal civil rights actions other than those based upon Section 1986 of the 1871 Act (42 U.S.C. § 1986). See, *e.g.*, Francis v. Crafts, 203 F.2d 809 (1st Cir. 1953), certiorari denied, 346 U.S. 835, 74 S.Ct. 43, 98 L.Ed. 357; Swan v. Board of Higher Education of City of New York, 319 F.2d 56, 59 (2d Cir. 1963); Hileman v. Knable, 391 F.2d 596, 597 (3d Cir. 1968); Beard v. Stephens, 372 F.2d 685, 688 (5th Cir. 1967); Crawford v. Zeitler, 326 F.2d 119, 121 (6th Cir. 1964); Smith v. Cremins, 308 F.2d 187, 189, 98 A.L.R.2d 1154 (9th Cir. 1962). Our decision in Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958), is to the same effect and requires our rejection of plaintiffs' argument that no statute of limitations bars Count I of these complaints.

Plaintiffs, however, argue that these decisions rest upon a faulty application of the Rules of Decision Act (28 U.S.C. § 1652).[4] They contend that the original purpose of that statute was to reassure opponents of diversity jurisdiction that state law would be applied by federal courts in diversity cases. They argue that any limitation on federally based actions is properly a matter of federal

[4] The statute provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply."

law and that the exception in the Rules of Decision Act covers this case. They urge that civil rights actions demand uniform federal rules in all particulars and that the failure of Congress to enact a statute of limitations applicable to Section 1982 of the Civil Rights Act evidences an intent that no statutory limitation should bar relief. We are unable to accept this position.

Regardless of the intended effect which the Rules of Decision Act was to have upon diversity jurisdiction, it was soon firmly applied to those gaps in federal law for which no uniform, common law was felt by the courts to be necessary. More than 30 years before the enactment of the Civil Rights Act, the Supreme Court held in McCluny v. Silliman, 28 U.S. (3 Pet.) 270, 7 L.Ed. 676, that under the Rules of Decision Act the federal courts must apply state statutes of limitations to federal causes of action in the absence of a special provision by Congress:

> "Under this statute [the Rules of Decision Act] the acts of limitations of the several states, where no special provision has been made by Congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts." 28 U.S. (3 Pet.) at p. 277, 7 L.Ed. 676.[5]

This rule has never been seriously challenged. Moreover, since Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, overruled the doctrine of Swift v. Ty-

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[5] Despite plaintiffs' characterization, Metropolitan R. Co. v. District of Columbia, 132 U.S. 1, 13, 10 S.Ct. 19, 33 L.Ed. 231, does not suggest that *McCluny* involved no federal question at all but was only an action under an implied contract. McCluny had asserted that his "rights accrued to him under a law of congress." 28 U.S. (3 Pet.) at p. 276, 7 L.Ed. 676. This is also reaffirmed in the discussion of the *McCluny* case in Campbell v. City of Haverhill, 155 U.S. 610, 619-620, 15 S.Ct. 217, 39 L.Ed. 280.

son, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865, adoption of state statutes to fill gaps in federal law has continued as a prime function of the Rules of Decision Act.

Nor does that Act's exception to state rules which conflict with federal law apply to statutes of limitations. Limitations on the period within which a right may be redressed do not conflict with the existence of that right. Cf. the Virginia Coupon Cases, 114 U.S. 269, 303, 5 S.Ct. 903, 29 L.Ed. 185. Rather, absent a direct expression by Congress to the contrary, limitations on actions are deemed so universal that the courts must supply an appropriate period by absorbing an applicable state statute into the interstices of federal law. As the Court stated in Campbell v. City of Haverhill, 155 U.S. 610, 616-617, 15 S.Ct. 217, 219-220, 39 L.Ed. 280:

> "Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against them after all their witnesses are dead, and perhaps after all memory of the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in Adams v. Woods, 2 Cranch, 336, 342 [2 L.Ed. 297], of a similar statute: 'This would be utterly repugnant to the genius of our laws'."

In addition to the application of a state statute of limitations to the Civil Rights Act of 1870 in O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980, state statutes of limitations have been held to prescribe limitations standards for such diverse and important federal Acts as the

Sherman Antitrust Act (Chattanooga Foundry v. Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241), and the Labor Management Relations Act of 1947 (International Union, United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192.) Plaintiffs have furnished no convincing distinction between the use of state limitations statutes for those statutes and their application to actions under the various Civil Rights Acts. No evidence from the legislative history or the nature of the Civil Rights Acts points to such a distinction. Federal legislation is often directed to the cure or prevention of a substantial evil. The fact that the Civil Rights Acts grew out of the need to remedy prior abuses of state law and state officials fails to indicate that Congress intended private actions to remain ripe interminably or that the federal courts could not be trusted to select appropriate state limitations statutes.

Plaintiffs point out that Congress enacted a one-year limitation for actions based upon the "passive accessory" provision of Section 6 of the 1871 Civil Rights Act (42 U.S.C. § 1986). They argue that the failure of Congress to enact a specific limitation applicable to any other provision of the Civil Rights Acts of 1866, 1870 or 1871, indicates an intent that no statutory limitation should apply. We disagree. A fairer interpretation of the import of Congress' 1871 action would be the desire to insure that actions against "passive accessories" must be brought in a relatively short time after any injury has been suffered. Congress has never demonstated any wish for unlimited actions or (apart from Section 1986) uniform standards of limitation in this area of the law.

Similarly, we refuse to read into Section 3 of the 1866 Civil Rights Act, now 42 U.S.C. § 1988, any antipathy to the adoption of appropriate state statutes of limitations in

civil rights actions.[6] Plaintiffs contend that Section 1988 limits the use of state common or statutory law in civil rights actions to those local rules which assist or extend the plaintiffs in vindicating their rights. As such, they argue, it bars the adoption of state laws of limitation of actions which cut off otherwise meritorious claims because of a lapse of time. We are reluctant to construe Section 1988 so broadly in the face of the well settled practice of adopting state limitations periods for federal law. Congress would surely have spoken more explicitly had it intended that civil rights actions should endure forever or be subject only to laches, regardless of the nature of the claim presented.

No conflict appears between Section 1988 and the application of state limitations acts in civil rights cases. That Section provides for the use of state law as a supplement to the remedial powers of federal district courts. Cf. Sullivan v. Little Hunting Park, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386. It is addressed to those cases in which

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[6] Section 3 of the 1866 Civil Rights Act provides in pertinent part:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, * * * "

existing federal practice falls short of accomplishing the purposes of the Civil Rights Acts because the courts otherwise lack the power to bring about the appropriate results. This function does not vary the application of appropriate substantive state laws ordinarily adopted by federal courts to fill gaps in federal substantive law. We find no indication that Congress intended Section 1988 to perpetuate such hiatuses because, in particular instances, plaintiffs' claims might be barred for failure to comply with state law. In truth, Section 1988 was designed to supplement but not supplant the Rules of Decision Act. Cf. In re Stupp, 23 Fed.Case No. 13,563, p. 296 at 299, 12 Blatchf. 501 (Cir.Ct., S.D.N.Y.1875); Schatte v. International Alliance, 70 F.Supp. 1008, 1010 (S.D.Calif. 1947), affirmed, 165 F.2d 216 (9th Cir. 1948), certiorari denied, 334 U.S. 812, 68 S.Ct. 1018, 92 L.Ed. 1743.

Section 1988 is inapplicable where substantive law denies a plaintiff any right to relief. All rules which affect the right of recovery necessarily affect its "remedy." That does not mean, however, that all such rules must necessarily be considered "remedial" within the purview of Section 1988. We reject the position, apparently urged by plaintiffs, that the bar imposed by a statute of limitations is remedial because, like survivorship, it affects the ultimate right to any recovery at all. Cf. Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961), certiorari denied, 368 U.S. 921, 82 S.Ct. 243, 7 L.Ed.2d 136; Pritchard v. Smith, 289 F.2d 153, 157, 88 A.L.R.2d 1146 (8th Cir. 1961).[7] Since

[7] To the extent that these two rules are not properly distinguishable, we believe that Section 1988 was unnecessarily and inaptly relied upon as the justification for the adoption of state survival law in federally based actions. As the opinion in Pritchard v. Smith conclusively indicates, other areas of federal law quite readily adopted state survival rules for application to federal statutes which contained no provision resembling Section 1988 (including

Section 1988 was not employed here to adopt any state remedial rules, it has no relevance to the instant case.[8]

Our conclusion finds further support in the long vitality of the Supreme Court's decision in O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980, which was again recently cited with approval in International Union, United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704, 86 S.Ct. 1107, 16 L.Ed.2d 192. Legislative inaction is, to be sure, a poor token of Congressional intent. Nevertheless, in this area of the law, as stated in *Hoosier Cardinal Corp.*,

> " * * * When Congress has disagreed with such an interpretation of its silence, it has spoken to overturn it by enacting a uniform period of limitations." 383 U.S. at p. 704, 86 S.Ct. at p. 1112.

We therefore hold that the application of state statutes of limitations to federal causes of action under the Civil Rights Acts is consistent with Congress' intent as expressed in the relevant statutes and violates neither the due process nor equal protection clauses. We adhere to our decision in Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958), and turn to the law of Illinois to determine the appropriate statute of limitations as to Count I of the instant cases.

(footnote seven continued)
the Jones Act, the Merchant Marine Act, the F.E.L.A., and even the Sherman Act). The result of *Brazier* and *Pritchard* has firm basis in federal law and policy quite apart from any reference to Section 1988. While many of the comments contained in those cases concerning the nature of Section 1988 are well considered, the decisions do not necessarily depend upon that statute.

[8] Compare Hughes v. Smith, 264 F.Supp. 767, 769 (D.N.J. 1967), where Section 1988 was itself employed as the basis for the application of the state's statute of limitations to bar an action brought under 42 U.S.C. § 1983. The point was conceded on appeal and the decision was affirmed by the Third Circuit, 389 F.2d 42 (1968).

The Applicable State Statute of Limitations Is Section 15 of the Illinois Limitations Act.

Turning to the various Illinois statutes of limitations, plaintiffs contend that the trial court erred in selecting Section 15 of the Illinois Limitations Act (Ill.Rev.Stat. (1967) ch. 83, § 16). They argue that the applicable provision should be either Section 12.1, dealing with actions regarding real estate, or Section 16, governing actions on written contracts (Ill.Rev.Stat. (1967) ch. 83, §§ 12.1 and 17).[9]

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[9] The statutory sections read:

16. Oral contracts—Arbitration awards—Damage to property—Possessory actions—Civil actions. § 15. Except as provided in Section 2-725 of the "Uniform Commercial Code", enacted by the Seventy-second General Assembly, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversation thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

12.1 § 1. 40 year limitation on claims to real estate. No action based upon any claim arising or existing more than 40 years before the commencement of such action shall be maintained, either at law or in equity, in any court to recover any real estate in this state or to recover or establish any interest therein or claim thereto, legal or equitable, against the holder of the record title to such real estate when such holder of the record title and his grantors immediate or remote are shown by the record to have held chain of title to said real estate for at least 40 years before the action is commenced, unless such claimant, by himself or by his attorney or agent, or if he be a minor or under legal disability, by his guardian, conservator, trustee, either parent, or any other person acting in his behalf shall within 40 years after the claim upon which such action is based arises, file in the office of the recorder of deeds of the county wherein such real estate is situated, a verified statement definitely describing the real estate involved, the nature and extent of the right or interest

In Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958), this Court held that Section 15 was the applicable state statute of limitations for actions based upon 42 U.S.C. §§ 1983 and 1985:

> "A statutory right of action is a 'civil action not otherwise provided for' within the meaning of § 15 of the limitation act and is governed by the five-year statute." 253 F.2d at p. 63.

Although the present action is based upon Section 1982 of the Civil Rights Act rather than Sections 1983 and 1985,

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(footnote nine continued)
claimed, and stating the facts upon which the same is based; Provided, however, that the holder of the record title to such real estate shall not be entitled to the protection of this Act if the real estate is in the adverse possession of another.

For purposes of this section an unborn or unascertained person may be a claimant and a verified statement may be filed on his behalf as hereinbefore provided.

For the purposes of this Act, any person who holds title to real estate by will or descent from any person who held the title of record to such real estate at the date of his death or who holds title by decree or order of any court, or by deed issued pursuant thereto, i.e., by trustee's, trustee's in bankruptcy, conservator's, guardian's, executor's, administrator's, receiver's, assignee's, master's in chancery, or sheriff's deed shall be deemed to hold chain of title the same as though holding by direct conveyance.

17. Writings—New contract. § 16. Except as provided in Section 2-725 of the "Uniform Commercial Code", enacted by the Seventy-second General Assembly, actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued; but if any payment or new promise to pay shall have been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the period of 10 years, then an action may be commenced thereon at any time within 10 years after the time of such payment or promise to pay.

it too is a cause of action created by statute. As such, we must agree with defendants and the district court that the rationale of our decision in *Wakat* governs and compels the application of Section 15 of the Illinois Limitations Act to Count I of each of the present actions.[10]

The Limitations Rulings Are Not Premature.

Where a complaint reveals that some claims are barred from recovery by limitations, they may be disposed of on a motion to dismiss. Kincheloe v. Farmer, 214 F.2d 604, 605, 75 S.Ct. 306, 99 L.Ed. 721 (7th Cir. 1954), certiorari denied, 348 U.S. 920; Anderson v. Linton, 178 F.2d 304, 309-310 (7th Cir. 1949). In many instances insufficient facts are contained in the complaint to afford an adequate basis for determining this issue. In the present case, however, despite allegations of conspiracy and concealment contained in the complaints, the court below concluded in each case:

> "The instant complaint, it should be noted, does present sufficient background for immediate determination of the limitations question. Moreover, considering the scope of the present litigation and the consequent magnitude of the discovery to be undertaken, it is particularly desirable that there be expeditious definition of the exact limits of the litigation in order to avoid unnecessary complexity and expense." 300 F.Supp. at pp. 218-219.

Plaintiffs argue that this ruling was improper in light of the allegations of their complaints. They contend that the

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[10] Plaintiffs apparently do not contest the holding below that *Baker* Count II, based upon the federal antitrust laws, is governed by the federal four-year antitrust statute of limitations. 15 U.S.C. § 15b. Likewise, no objection has been raised to the application of the four-year statute of limitations provided by state law to Count III of the complaints based upon the Illinois state antitrust statute. Ill.Rev.Stat. (1967) ch. 38, § 60-7.

alleged conspiracies preclude the passage of the limitations statute for all members of the classes until the last overt conspiratorial act has been disclosed. They also argue that the complaints contain allegations that the defendants concealed fact underlying the cause of action, thus tolling the statute. We feel, however, that the scope of further litigation should be delineated and confined within definite time limitations at this initial stage. This will facilitate disposition of the basic elements of the controversy and still allow for individual variations, exceptions and expansions as justice requires. We agree with the district court that at present insufficient basis has been presented for tolling the statute of limitations.

Bald allegations of conspiracy and concealment do not warrant delay in disposing of the question of the applicability of the statute of limitations. The statute of limitations does not toll automatically. Morgan v. Koch, 419 F.2d 993 (7th Cir. 1969). The allegation of a conspiracy alone is not an adequate basis from which fraudulent concealment may be inferred. Laundry Equipment Sales Corp. v. Borg-Warner Corp., 334 F.2d 788, 792 (7th Cir. 1964). Where courts have tolled limitations periods because of the existence of a conspiracy, the basis for the action has been the inherently secret nature of the conspiracy involved and its necessity as an element in the cause of action. Cf. Allis-Chalmers Mfg. v. Commonwealth Edison Co., 315 F.2d 558, 562 (7th Cir. 1963).

In order to obtain the shelter of the federal doctrine of fraudulent concealment, plaintiffs must be prepared to adduce sufficient evidence to warrant the conclusion that defendants concealed the basic facts disclosing the existence of a cause of action and that plaintiffs remained in ignorance of those facts through no fault of their own. Bailey v. Glover, 88 U.S. 342, 349, 21 Wall. 342, 349, 22 L.Ed. 636. Where, as in the case of many conspiracies

in violation of federal antitrust laws, the wrong is self-concealing, little need be added in order to justify tolling the statute. In the present case, however, we are persuaded that the language of Judge Friendly in Moviecolor Limited v. Eastman Kodak Company, 288 F.2d 80, 87-88, 90 A.L.R. 2d 252 (2d Cir. 1961), is fundamentally applicable:

> "Although the complaint liberally uses the adverb 'fraudulently' as to defendants' conduct, such allegations are not enough to make out a case of concealment. The complaint is inconsistent with any view either that plaintiff did not know of its injury in signing away its rights to the Keller-Dorian process, see Developments in the Law—Statutes of Limitations, 1950, 63 Harv.L.Rev. 1177, 1221, or that it did not know of the actions of the defendants and of French and American Keller-Dorian that led up to that. The case is thus quite unlike those in which a defendant has concealed the transaction sued upon, Bailey v. Glover, supra; Rosenthal v. Walker, 1884, 111 U.S. 185, 4 S.Ct. 382, 28 L.Ed. 395, or the facts rendering a known transaction actionable, Traer v. Clews, 1885, 115 U.S. 528, 6 S.Ct. 155, 29 L. Ed. 467; Exploration Co. v. United States, 1918, 247 U.S. 435, 38 S.Ct. 571, 62 L.Ed. 1200; United States v. Diamond Coal & Coke Co., 1921, 255 U.S. 323, 41 S.Ct. 335, 65 L.Ed. 660, or his own identity, Holmberg v. Armbrecht, supra. Mere ignorance of evidence on which to establish a claim is not enough, even if the complaint here could be read as alleging that. Tinkoff v. United States, 7 Cir., 1954, 211 F.2d 890; Dawson, Fraudulent Concealment and Statutes of Limitation, 1933, 31 Mich.L.Rev. 875, 916. Even if no affirmative act of concealment is required in restraint of trade conspiracy cases; see Dawson, supra, at 880, 907-08; American Tobacco Co. v. People's Tobacco Co., [5 Cir., 1913, 204 F. 58,] supra; cf. 63 Harv.L.Rev. at 1221, in contrast to the usual rule where there is no fiduciary relationship, a point we do not decide, there is no allegation that plaintiff did not know in the late 1920's and early

> 1930's whatever the facts were as to joint action by defendants. Viewed with the benevolence proper on a motion under F.R.Civ.Proc. 12(c), the complaint does not make out, indeed it rather negatives, concealment, Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., [9 Cir., 1950, 185 F.2d 196] supra; we do not read Crummer Co. v. DuPont, [5 Cir., 1955, 223 F.2d 238] supra, as pointing to a contrary result."

Here there is no indication in the complaints that defendants concealed from plaintiffs or that plaintiffs actually lacked knowledge of the facts disclosing the discriminatory sales practices upon which this case rests. There is no allegation that defendants attempted to create or perpetuate an erroneous impression in the minds of the plaintiffs that the homes were being sold to them at the same price, on the same terms, and under the same conditions as they would be sold to whites. However, in order to insure that individual members of the plaintiff classes are not unfairly deprived of relief because the facts of their particular cases may differ from those of the classes as a whole, they should have an opportunity to display the necessary concealment at a subsequent date should the merits of the complaints be upheld.[11]

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[11] The complaints also contain scattered allegations supporting the contention that certain courses of wrongful conduct engaged in by defendants were fraudulently deceptive and concealed. While we are not called upon to pass upon the merits of the claims or upon the effect of the individual allegations of fraudulent concealment, we note that reconsideration of the applicability of the statute of limitations may be in order insofar as its application is sought to certain members of the classes with regard to some peripheral wrongs. Thus the district court may be called upon to decide whether the alleged concealment of the appraised value of the mortgaged property of plaintiffs calls for recovery and tolling of the statute of limitations. Likewise, the misrepresentation of compliance with building codes may support recovery and require that, as to certain plaintiffs, the statute be tolled.

The Statutes of Limitations Do Not Begin to Run Until Each Contract Terminates.

After careful consideration, the district court concluded that the three statutes of limitations commenced running only upon the termination of the individual contracts. The court stated that the defendants "are alleged to have been reaping the unlawful benefit through continuing enforcement of their unlawful scheme." 300 F.Supp. at p. 220. We agree with this conclusion.

Plaintiffs have alleged wrongs committed by defendants which continue during the entire lives of the individual purchase contracts. They have alleged a conspiracy among defendants, the object of which was the establishment of a continuing relationship with individual plaintiffs. That relationship, by the same token, constituted a prolonged and continuing invasion of the rights of the purchasers. As in Hazeltine Research, Inc. v. Zenith Radio Corporation, 418 F. 2d 21 (7th Cir. 1969), the limitations periods commence to run from the last overt act of the conspiracy, permitting plaintiffs to recover "for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-[limitation] period acts occurring in the damage period" (418 F.2d at p. 25). Because of the continuing nature of the overt acts alleged, the statutes of limitations do not commence to run when the contracts were executed but when they terminate. Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481, 502, n. 15, 88 S.Ct. 2224, 20 L. Ed.2d 1231.

Defendants are incorrect when they argue that here, as in Emich Motors Corporation v. General Motors Corp., 229 F.2d 714, 59 A.L.R.2d 159 (7th Cir. 1956) and Baldwin v. Loew's Inc., 312 F.2d 387 (7th Cir. 1963), only a single act was involved. In *Emich*, this Court concluded that the announcement by General Motors that Emich's

dealership was to be cancelled and the actual cancellation of the leadership were so contiguous in time and of such a unitary character as to present but a single invasion of the rights of the plaintiff. And in *Baldwin*, acts of defendants which terminated outside the limitation period causd plaintiff to enter a lease with the third party. As those cases disclose, the touchstone of our inquiry must be the nature and extent of defendants' behavior, not the duration of plaintiff's injury. Here the defendants have entered into a series of contracts which manifest an on-going relationship between the individual participants and constituting the alleged invasion of the rights of the plaintiffs.

For the foregoing reasons, the limitations portions of the district court's orders are affirmed.[12]

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[12] Defendants' objection to the filing of plaintiffs' reply brief is overruled. In No. 17750-17751, defendants' motion for taxing the costs of printing the opinion below in their appendix is granted but only as to printing the parts of the opinion not relating to the statute of limitations.

APPENDIX B

OPINION

WILL, District Judge.

Plaintiffs, suing as a class, seek relief with respect to contracts for the sale of used residential property in the City of Chicago. Their complaint contains five counts. The first alleges violation of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982, 1983, 1985(3), and of the Thirteenth and Fourteenth Amendments of the Constitution of the United States. Counts two and three allege, respectively, violations of the federal antitrust laws and of the antitrust laws of the State of Illinois. Count four of the complaint alleges violation of the federal securities laws. Count five alleges violation of the Illinois common law regarding fraud, usury and unconscionable contracts.

This Court has previously determined that under Rule 23 of the Federal Rules of Civil Procedure, plaintiffs can maintain this action as a class action; and the Court has defined the plaintiff class, subject to future revision and refinement, to be composed of negroes who, since January 1, 1952, have entered into installment contracts for the purchase of used residential real estate in the City of Chicago.[1] The determination that a class action is appropriate was based on the recognition that the common questions of law and fact "predominate" over the individual questions. The essence of this complaint is that violations of law resulted from defendants' concerted exploitation of a condition of *de facto* racial segregation existing in the City of Chicago. Thus, the Court found that common questions of law and fact "predominate" within the terms of Rule 23 because it is alleged that the illegal advantage secured under any one contract depended on, was complemented by, and resulted from a concert and pattern of discriminatory activity including other similar contracts.

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[1] Contract Buyers League v. F. & F. Investment, 69 C 15, (N.D. Ill. March 29, 1969).

The Motions to Dismiss

By way of motions to dismiss each and every count of the complaint, defendants have now challenged the sufficiency of the allegations.

Before proceeding with the required determination, it should be noted at the outset that when considering a motion to dismiss, a district court must consider all the allegations of fact contained in the complaint and it is uniformly recognized that when a court is making this determination, the complaint must be liberally construed.[2]

Count I—The Civil Rights Act of 1866, and the Thirteenth and Fourteenth Amendments

The First count of the complaint relates essentially to the allegation, here taken as admitted for purposes of the motions to dismiss, that defendants exploited a system of *de facto* racial segregation that existed in the City of Chicago, and that by taking advantage of the scarcity of housing for negroes in the City of Chicago, defendants have secured unlawful advantage in the contracts executed by plaintiffs. As described in the complaint, the scheme of exploitation often included obtaining

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[2] In language characteristic of the determination of a motion to dismiss, the Seventh Circuit Court of Appeals has said, "* * * on a motion to dismiss, a complaint should be construed in the light most favorable to plaintiff with all doubts resolved in his favor; and in view of what is alleged, with all allegations well pleaded being taken as true, if it can reasonably be conceived that the plaintiff can make a case upon trial which would entitle him to some relief the complaint should not be dismissed." Jung v. K. & D. Mining Co., 260 F.2d 607, 608 (7th Cir. 1958).

See also, United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963); Thomas v. Atlantic Coast Line R. Co., 201 F.2d 167, 170 (5th Cir. 1953); Cool v. International Shoe Co., 142 F.2d 318, 320 (8th Cir. 1944).

purchase money mortgages based on false and excessive appraisals of used residential property. The essence of the scheme is alleged to have been the purchase of residential properties from white homeowners and the resale, often in the nature of quick "turn-around" transactions, at greatly inflated prices to negro purchasers, who were disadvantaged by the system of *de facto* segregation and the resulting shortage of housing for negroes in Chicago. The terms of the contracts, especially the price, are alleged to represent unlawful profit gained through this pattern of exploitation.

The complaint also alleges in Count I a separate aspect of discriminatory activity. It alleges that some defendants amplified and fostered the *de facto* segregation on which the contracts depended. The complaint asserts that some of the defendants engaged in what is popularly known as "blockbusting," that some of the defendants stimulated and preyed on racial bigotry and fear by initiating and encouraging rumors that negroes were about to move into a given area, that all non-negroes would leave, and that the market value of properties would descend to "panic prices" with residence in the area becoming undesirable and unsafe for non-negroes. The complaint thus charges not only that defendants exploited the existing condition of *de facto* segregation, but that by prompting and encouraging a stampede of white sellers, some defendants extended and developed the underlying inequity of segregation that was the breeding ground for their discriminatory profit.

Section 1982 of the Civil Rights Act of 1866 provides that:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by

> white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), the Supreme Court of the United States declared the constitutionality and determined the scope of Section 1982. Beginning its opinion with the sum and substance of its determination, the Court stated,

> We hold that § 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment. *Id.* at 413, 88 S.Ct. at 2189.

The manner of discrimination specifically involved in *Jones* was the refusal to sell a home to an individual solely on the ground of the individual's race. In the instant case, the discrimination alleged is the sale of used residential property to negroes at higher prices and on more burdensome terms than similar property is sold to whites. Defendants contend that this difference in fact is a difference in kind under the law, that the Supreme Court's conclusion as to the import of Section 1982 is therefore not applicable to this case.

But the language and logic of *Jones* and the constitutional application that the Supreme Court regarded as the source of the Civil Rights Act of 1866 must be equally applicable to the discrimination alleged in this case. The Court found that the legislative history of the 1866 Act demonstrated the Congressional intent to ensure that the former slaves could participate fully in a national economy. It was the Court's conclusion that the existence of a black market distinct from a white market was the *de facto* vestige of what the Congress in 1866 intended to abolish

as a critical means of making the black man a free man. The conviction recognized was that the obliteration of the social system where one man was the slave of another required as a fundamental matter that our economy be undifferentiated as to the race of a man. The Court thus understood Section 1982 as implementing the Thirteenth Amendment "to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." *Id.* at 443, 88 S.Ct. at 2205.

The Court did point out that § 1982 was limited to activity directly covered by the express terms of the Section. The Court thus stated, "at the outset, it is important to make clear precisely what this case does *not* involve," and went on to say that § 1982 "does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. * * * It does not refer explicitly to discrimination in financing arrangements or in the provision of brokerage services." *Id.* at 413, 88 S.Ct. at 2189. Of course, the alleged blockbusting and discriminatory lending in the instant case do not fall within the express terms of § 1982. However, the basic claim in this lawsuit clearly does. The basic activity is the purchase of property. Blockbusting and discriminatory lending are alleged to be additional activities, part and parcel of the alleged conspiracy, which extended the scope and impact of the allegedly discriminatory sale and purchase.

Defendants *in terrorem* point to what they suppose to be the incredible consequences of a holding that Section 1982 bars the sale of residential property to negroes at a higher price because of their race. Defendants contend that this holding would mean that "every non-white citizen has a cause of action maintainable in Federal Court to either rescind or reform each and every transaction in-

volving a purchase or leasing of either *real* or *personal* property by the simple allegation that he was charged more than a white person *would have been* charged or that he received less favorable terms and conditions than would have been given to a white person."

For purposes of a motion to dismiss, and considering that any such allegation would be subject, as any allegation, to the test of proof on trial, defendants are correct. Moreover, the converse is also true. Every white citizen may allege a cause of action on the ground that he was charged more or received less favorable terms than would have been given to a black person. The Supreme Court noted that the defendant in *Jones* similarly pointed to "the revolutionary implications of so literal a reading of § 1982." *Id.* at 422, 88 S.Ct. at 2194. The Supreme Court responded by stating "our examination of the relevant history, however, persuades us that Congress meant exactly what it said." *Id.* at 422, 88 S.Ct. at 2194.

What was true in *Jones* is true here also—that defendants call "revolutionary" what is simply a denial of their assumption that there is a necessary sanctity in the *status quo*. Defendants present the discredited claim that it is necessarily right for a businessman to secure profit wherever profit is available, arguing specifically with respect to this case that they did not create the system of *de facto* segregation which was the condition for the alleged discriminatory profit. But the law in the United States has grown to define certain economic bounds and ethical limits of business enterprise. Developed areas of the law such as are invoked under the fraud and antitrust counts of this complaint are characteristic examples. So we are hearing an old and obsolete lament. For it is now under-

stood that under § 1982 as interpreted in Jones v. Alfred H. Mayer Co. there cannot in this country be markets or profits based on the color of a man's skin.

Defendants also suggest that this case cannot involve "actual" discrimination, but only "hypothetical" discrimination. Their notion is that because the complaint does not state that defendants ever made sales of similar property to whites as they sold to plaintiffs, the possibility of discrimination somehow disappears.

We first point out what should be obvious—that allegations are not "hypotheticals." The claim that defendants sold to negroes at a higher price than similar property would be sold to whites will be subject to proof on trial. Second, and most important, defendants' position elaborated is that if property is sold to a negro above what can be demonstrated to be the usual market price, there can be no discrimination unless the same seller actually sells to whites at a lower price. It should be clear that in law this result would be obnoxious. In logic, it is ridiculous. It would mean that the 1866 Civil Rights Act, which was created to be an instrument for the abolition of discrimination, allows an injustice so long as it is visited exclusively on negroes.

In sum, then, there is no reason to distinguish a refusal to sell on the ground of race and a sale on discriminatory prices and terms. Count I of this complaint states a claim under Section 1982 of the Civil Rights Act of 1866 as understood in Jones v. Alfred H. Mayer Co., and the motions to dismiss must be denied with respect to Count I of the complaint. Because the motion is thus denied, we need not reach the question of whether the complaint states a claim under the other grounds asserted in Count I.

Count II—The Federal Antitrust Laws

In Count II of the complaint, plaintiffs allege that defendants have violated Section 1 of the Sherman Act, 15 U.S.C. § 1, through the pattern of activity alleged in Count I; and plaintiffs add allegations that there has been continuing action and agreement by defendants and their co-conspirators to fix the prices on the sale of real estate to plaintiffs at approximately $5,000 to $15,000 per unit above the fair market value of each unit. The particularization of the antitrust violation also includes allegations that defendants and their co-conspirators arranged the elimination of price competition in the sale and financing of real estate properties and in the discounting of installment contracts entered into by plaintiffs.

There is no question, and defendants do not dispute, that the activities alleged can violate the antitrust laws if the scope of such activities is sufficient to bring them within the ambit of federal regulation. The only substantial issue raised by the motion to dismiss Count II of the complaint is, therefore, whether the combination and conspiracy complained of is alleged to be "in restraint of interstate commerce" as the nature of interstate restraint has been understood in the application of the federal antitrust laws.

It is established under the decided cases that, depending upon the particular circumstances, a business activity conducted solely intrastate may result in an interstate restraint that is violative of the federal antitrust laws. The Supreme Court recognized this manner of violation in Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328 (1948) where the Court generalized the test to be applied, stating,

> For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local

> activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision. *Id.* at 234, 68 S.Ct. at 1005.

Or again, in United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949), the Court said,

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. *Id.* at 464, 69 S.Ct. at 716.

A substantial body of precedent now describes the various circumstances where the effect of local activity on interstate commerce is sufficient to be violative of the federal antitrust laws. *See, e.g.*, United States v. Employing Plasterers' Association, 347 U.S. 186, 74 S.Ct. 452, 456, 98 L.Ed. 618 (1954); Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954); United States v. Chrysler Corp. Parts Wholesalers, 180 F.2d 557 (9th Cir. 1950); United States v. Detroit Sheet Metal & Roofing Contractors Ass'n, 116 F.Supp. 81 (E.D.Mich.1953).

In this Count of the complaint, plaintiffs state a number of respects in which they suggest that the activities of defendants and their co-conspirators adversely affected interstate commerce. While the relation asserted is gen-

eral, under the liberal construction of allegations being challenged by a motion to dismiss, plaintiffs have alleged the necessary interstate effect.

Some of the more substantial of the allegations establishing the requisite effect are that the installment contracts are significantly related to an interstate market for the discount and sale of installment contracts, and that the alleged improper financing of these properties would affect the interstate market for such financing. Also of note is the alleged background of *de facto* segregation and the existence of a limited supply of housing for negroes, indeed, a separate market for the negro buyer. In view of this background and plaintiffs' allegations that negroes have decided whether or not to move to Chicago on the basis of the prices of real estate in Chicago, there is reasonable possibility that the alleged fixing of prices of Chicago real estate could substantially affect the buying and selling of real estate in areas outside Illinois — as for instance in the proximate areas of Indiana. Thus, as is here indicated, the alleged interstate effects are not absurd nor patently false. Accordingly, the motions to dismiss Count II of the complaint must be denied.

Count III — The Illinois Antitrust Laws

In view of the conclusion that this complaint states a federal claim, it is clear that this Court has pendant jurisdiction to hear the cause alleged under the antitrust laws of the State of Illinois, specifically Chapter 38, Section 60-3(1) (a), Illinois Revised Statutes, 1967. That a cause is stated is apparent through a comparison of the allegation of price-fixing and the specific language of the statute

invoked.[3] And the pendant jurisdiction of this Court is equally clear. The principle that a federal court may retain jurisdiction of a state cause depending on its relation to the federal cause alleged in the same suit was clarified by the Supreme Court of the United States in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The Court held that "[t]he state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.* at 725, 86 S.Ct. at 1138. The court went on to emphasize the discretionary character of the power and that the federal court should look to "considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726, 86 S.Ct. at 1139. The similarity of the federal and state causes of action included in this complaint is readily apparent and leaves no doubt that pendant jurisdiction is appropriate.

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[3] Ch. 38, § 60-3, Illinois Revised Statutes, 1967.

60-3 Violations—Enumeration § 3. Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto; * * *

THE STATUTES OF LIMITATION

Defendants assert, as part of their motions to dismiss, that statutes of limitation relevant to the various counts of the complaint bar relief with respect to many of the installment contracts presently included in this litigation under the Court's initial delineation of the plaintiff class. Plaintiffs' immediate response is to question the propriety of raising the issue of limitations by way of a motion to dismiss. Plaintiffs contend that the defense of limitations must instead be stated in defendants' answers to the complaint.

It is correct that some federal courts have found that the lack of detail in notice pleading renders improper the raising of limitations questions by motion to dismiss.[4] But the established rule in this Circuit is that where the complaint is definite enough to support consideration of a question of limitations, the question can be raised under Rule 9(f) of the Federal Rules of Civil Procedure by a motion to dismiss the complaint.[5] The instant complaint,

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[4] *See* Annot., 61 A.L.R.2d 300, 327 (1958).

[5] Kincheloe v. Farmer, 214 F.2d 604 (7th Cir. 1954), cert. denied 348 U.S. 920, 75 S.Ct. 306, 99 L.Ed. 721 (1955); Anderson v. Linton, 178 F.2d 304 (7th Cir. 1949). In its later statement of the rule in *Kincheloe* the Seventh Circuit Court of Appeals said, "Rule 9(f) of such rules provides: 'For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.' It has frequently been held that the reason for 'averments of time and place' is to make ascertainable whether a cause of action is barred by the statute of limitations, and that where so shown a complaint is properly dismissed on motion. Gossard v. Gossard, 10 Cir., 149 F.2d 111, 113; Anderson v. Linton, 7 Cir., 178 F.2d 304, 309; Suckow Borax Mines Consolidated, Limited v. Borax Consol., 9 Cir., 185 F.2d 196, 204, and cases therein cited." 214 F.2d at 605.

it should be noted, does present sufficient background for immediate determination of the limitations question. Moreover, considering the scope of the present litigation and the consequent magnitude of the discovery to be undertaken, it is particularly desirable that there be expeditious definition of the exact limits of the litigation in order to avoid unnecessary complexity and expense.

In posing the bar of statutes of limitation, defendants rely primarily on the opinion of the Seventh Circuit Court of Appeals in Baldwin v. Loew's Incorporated, 312 F.2d 387 (7th Cir. 1963). Defendants draw the conclusion that *Baldwin* requires this Court to look to the dates of execution of the various contracts as the last point in time when the action with respect to any particular contract could have accrued. Defendants thereby insist that there can be no relief with respect to any contract that was executed earlier than the limitations period, even if payments were made at a later time still within the applicable period, are still being made, or are required under the contracts to be made for many years to come.

We of course agree that *Baldwin* states the rule in this Circuit in comparable cases. But defendants have seriously misunderstood how the facts in *Baldwin* relate to the principle stated and to the underlying rationale of statutory provisions for the limitation of actions.

Baldwin was a civil antitrust action brought by the owners of a movie theatre. The plaintiffs sought treble damages, charging a conspiracy of defendants, who included the major motion picture film distributors in the United States. It was alleged that "defendants were engaged in a continuing conspiracy in the licensing of film, in order to favor their own operated circuits of theatres and the circuits of theatres of others and to suppress the

competition of independent theatre operators." 312 F.2d at 389. It was alleged that because of the conspiracy, plaintiffs were forced to lease their theatre to one of these non-defendant "other" chain operators on terms far inferior to what plaintiffs would have obtained absent the unlawful conspiracy.

The lease in *Baldwin* was executed in 1945 for a five-year term, with successive options granted to the lessee to renew at five-year intervals until 1965. The lessee had exercised its option and renewed the lease in 1950 and 1955. The suit was filed in 1953, and the court was applying a two-year statute of limitations. In concluding that the action was barred by the two-year statute, the Court distilled its determination as follows:

> Where one has been injured by a civil conspiracy a statute of limitations begins to run at the time that injury is inflicted. In this case that date was when the lease was executed between plaintiffs and the lessee in 1945. *Id.* at 390.
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> * * * * * * * * *
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> The exercise in 1955 of an option to extend the lease of 1945, the year in which "the blow which caused" the damage was struck", was relevant only as an element of damages. It was not an overt act from which the running of the statute of limitations may be computed. *Id.* at 391.

It is indisputable that on the facts alleged in *Baldwin* the defendants in *Baldwin* struck their blow and inflicted injury at the time of the execution of the lease. And on the facts alleged, this was the only time at which the conspiracy acted or could have acted to cause the injury and secure the unlawful benefit. The defendants in *Baldwin* were not parties to the lease. Conversely, the lessee was not a defendant. The defendants were not enforcing the lease and no payments were being made to them. The

allegations in the instant complaint, by contrast, place defendants in a fundamentally different posture *vis a vis* the infliction of harm and exaction of unlawful benefit.[6] Defendants here are alleged to have been reaping unlawful benefits through continuing enforcement of their unlawful scheme. Indeed, the best indication of what would be the continuing infliction of injury are the efforts to collect on the contracts which have brought plaintiffs repeatedly to this Court to seek relief from state actions instituted to evict them from the homes they contracted to purchase.

The Court said in *Baldwin*, "[t]he exercise in 1955 of an option * * * was relevant only as an element of damages," because the lessee exercised the option—not the defendants. The defendants had long before locked the plaintiff theatre into the unfavorable arrangement, and the defendants were not alleged to have done anything

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[6] The importance of this difference was in fact fundamental in the argument of the *Baldwin* case on appeal. When defendants articulated their ultimately prevailing position that "ANY CLAIM FOR RELIEF ACCRUED WHEN THE THEATRE WAS LEASED AND NO OVERT ACTS OF DEFENDANTS HAVE OCCURRED WITHIN THE PERIOD NOT BARRED BY THE STATUTE OF LIMITATIONS" they began by postulating the essential factual matter on which they clearly intended to base their position. They stated,

> The essence of the plaintiffs' alleged claim for relief is that they were forced by virtue of a conspiracy in restraint of trade to lease their theatre to a company that operated a circuit of theatres. It is not alleged that the lessee was or is a co-conspirator with the defendants or was in any way affiliated with any of the defendants. In fact, it is alleged that the lessee is an "independent" operator of a circuit of theatres. Brief for the Appellee at 25, Baldwin v. Loew's Incorporated, 312 F.2d 387 (7th Cir. 1963).

after the date of execution of the lease which could have constituted the infliction of harm that the Court rightly regarded as crucial.[7]

Basic to defendants' misunderstanding of *Baldwin's* validity and relation to the instant case is the failure to keep in mind the purpose served by statutes of limitation. And defendants' error is common to some of the cases where analysis is similarly lost in the metaphysic of "essential" act or injury, the effort solely to determine when the "real" injury took place. Statutes of limitation do not

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[7] It is interesting in regard to *Baldwin's* validity to note the discussion in one of *Baldwin's* progeny. Century Hardware Corp. v. Powernail Company, 282 F.Supp. 223 (E.D.Wis.1968). The Court in *Century Hardware* declared its "serious doubt about the soundness" of *Baldwin, Id.* at 227, and complained that *Baldwin* propounded "principles that, in practice, are extremely difficult to apply." *Id.* But it appears that a possible reason for the Court's complaint was a misreading of the facts of *Baldwin* similar to the misunderstanding displayed by defendants in this case. In stating the facts of *Baldwin*, the Court in *Century Hardware* wrote, "[h]owever, the plaintiffs had executed the lease of their theatre to a chain operator in 1945 and had exercised options to renew the lease as late as December 31, 1955." *Id.* at 226. But in *Baldwin* it was *not* the plaintiff lessors who held the option and exercised it. It was the lessee. And the lessee, as we have pointed out, was not a defendant, but so far as that lawsuit was concerned, was merely the beneficiary of the injury inflicted by defendants in 1945. The mistaken notion that plaintiffs in *Baldwin* held the option of course supports the impression that defendants were exerting pressure on plaintiffs subsequent to the execution of the lease in 1945; and therefore this misunderstanding of the facts might well cause a court to complain about *Baldwin*. But given an understanding of the facts, the *Baldwin* opinion is entirely consistent with the rationale of statutes of limitation, but is applicable only in the somewhat unique fact situation there presented. If it were to be given the interpretation defendants here urge, we too would have serious doubts as to its soundness.

properly depend on Platonic essences. The very practical and positive purpose served by these statutes is to ensure that stale claims will not be decided and the processes of justice thereby debilitated with attendant problems such as loss of evidence.[8] When this case is regarded in this light it is clear that the applicable statutes of limitation do not bar claims with respect to contracts not terminated before the running of the limitations periods. And regarded in this light, most of the very cases cited by defendants support this result.[9] In the critical sense intended under the statutes, the claims alleged in this case are obviously not stale. The circumstances of unlawfulness are alleged to be as present and vital today as at any time during the contract arrangements.

This immediacy of the alleged injury goes beyond the continuing collection of allegedly unlawful profit and enforcement of the contracts. It has been determined that the first count of this complaint states a claim for violation of the Civil Rights Act of 1866. Only the most parochial view of the Civil Rights Act would identify its ultimate intention to be simply the restoration of any monetary loss suffered on account of race. The abolition of slavery was to be a redemption of human dignity. The indignity alleged to have been suffered in this case cannot be confined to the dates of execution of the various contracts,

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[8] Burnett v. New York Central R.R., 380 U.S. 424, 428, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965); Luckenbach S.S. Co. v. United States, 312 F.2d 545 (2d Cir. 1963); D'Onofrio Const. Co. v. Recon Company, 255 F.2d 904, 908 (1st Cir. 1958); United States v. Vibradamp Corp., 257 F.Supp. 931, 939-940 (S.D.Colo. 1966).

[9] *See, e.g.*, Suckow Borax Mines Consol. v. Borax Consolidated, 185 F.2d 196 (9th Cir. 1950); Fleischer v. A.A.P., Inc., 180 F.Supp. 717 (S.D.N.Y. 1959); Levy v. Paramount Pictures, Inc., 104 F. Supp. 787 (N.D.Cal.1952).

but can be understood only in relation to the continuing activity whereby the alleged indignity continues to be inflicted and exploited. Thus, even if the rule in this Circuit were, contrary to *Baldwin*, that whatever the relation of the parties, continuing exactions under an allegedly unlawful contract could only constitute the accretion of "damage" and not "injury", this could not with reason be the rule in the special situation of a contract allegedly executed in violation of a person's civil rights.

It remains to determine which statutes of limitations are applicable in this case. The antitrust laws specifically include their own provisions for the limitation of actions. Consequently, there is no question as to which individual claims are barred with respect to Counts II and III of the complaint. The 1866 Civil Rights Act, however, which is the foundation for the cause of action stated in Count I of the complaint, does not contain any limitations provisions. Focusing this absence, plaintiffs argue that this court has great discretion to exercise its equitable powers to decide which, if any, individual claims under the Civil Rights Act should be barred. Plaintiffs also argue alternatively that the limitations period of 10 years provided in Chapter 83, Section 17, Illinois Revised Statutes, 1967, or the 40 year statute of limitations provided in Chapter 83, Section 12.1, should be applied with respect to the cause of action stated in Count I of the complaint.

Where a federal statute does not stipulate a limitations period, the general practice in the federal courts is to apply the appropriate state statute. This is generally understood to be the statute that the forum state "would enforce had an action seeking similar relief been brought in a court of that state." Swan v. Board of Higher Education, 319 F.2d 56, 59 (2 Cir. 1963). *See, also*, International Union, United Automobile, Aerospace and Agricultural

Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 703-705, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966); O'Sullivan v. Felix, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914). Indeed, before a provision of limitations was added by Congress to the federal antitrust laws, the rule in this Circuit was that the Illinois statute for similar state actions should be applied. Schiffman Bros. v. Texas Co., 196 F.2d 695 (7th Cir. 1952). And consistent with the general rule, the federal courts have uniformly applied state limitations provisions to claims stated under the Civil Rights Act, 42 U.S.C. §§ 1981-1985. *See, e.g.*, O'Sullivan v. Felix, *supra*; Hileman v. Knable, 391 F.2d 596, 597 (3rd Cir. 1968); Beard v. Stephens, 372 F.2d 685, 688 (5th Cir. 1967); Swan v. Board of Higher Education, 319 F.2d 56, 59 (2d Cir. 1963); Smith v. Cremins, 308 F.2d 187, 189, 98 A.L.R. 2d 1154 (9th Cir. 1962); Crawford v. Zeitler, 326 F.2d 119, 121 (6th Cir. 1964); Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958).

In Wakat v. Harlib the Seventh Circuit Court of Appeals effectively held the statute of limitations applicable to the claim stated in Count I of the instant complaint. In *Wakat* the plaintiffs alleged "violations of the federal civil rights act, 42 U.S.C.A. § 1981 et seq.," particularly § 1983 and § 1985. The Court of Appeals held that the appropriate Illinois statute of limitations for the action under the Civil Rights Act was Chapter 83, Section 16, 1967 Illinois Revised Statutes (Section 15 of the Limitations Act) which provides a five-year period of limitations.[10] The Court un-

[10] Section 15 of the Limitations Act provides that " * * * actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued."

derstood the five-year provision to be expressly applicable to actions under the federal Civil Rights Act in that "a statutory right of action is a 'civil action not otherwise provided for' within the meaning of § 15 of the limitation act." 253 F.2d at 63.

Contrary to what appears as the obvious meaning of *Wakat*, plaintiffs argue that the Court of Appeals did not regard the applicability of the five-year statute as a general rule in this Circuit, but rather, that the Court was simply exercising its discretion to allow the particular action asserted in that case. Plaintiffs urge this Court to apply the equitable doctrine of laches to determine the period during which plaintiffs in this case were required to pursue any relief under the Civil Rights Act.

The requested exercise of equitable discretion is precluded by the Court's judgment in *Wakat* that an express rule of law determines the limitations period for the 1866 Civil Rights Act. The Court declared with respect to Section 1985 of the Act,

> Count I relies expressly upon 42 U.S.C.A. § 1985 which creates a statutory right of action growing out of a conspiracy to impede, hinder, obstruct, or defeat the due course of justice in any state, with the intent therein set forth. This cause of action was created by statute. It is not one of the actions enumerated in § 14. However the Illinois limitations act, § 15, does cover all civil actions not otherwise provided for by that act and therefore the failure to include an action under § 1985 aforesaid within § 14 does not mean that Illinois has no limitation act to bar such an action. *Id.* at 63.

In view of this analysis, there is no reason to distinguish Section 1985 from the other sections of the Civil Rights Act of 1866, and the Court's discussion thus makes it clear that the relation of the five-year statute to relief under the

Civil Rights Act was to be understood as a general rule. Moreover, while plaintiffs cite no cases which directly support their suggested theory of equitable discretion in this matter, their theory was specifically rejected by the Second Circuit Court of Appeals in Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir. 1963). There the Court reflected,

> Although plaintiff has not raised the point, we have considered whether, because his complaint seeks not damages but rather declaratory and injunctive relief, it should be considered solely "equitable" and hence as governed not by a statute of limitations but rather by the doctrine of laches. *See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 395-396, 66 S.Ct. 582, 90 L.Ed. 743 (1946). We have concluded, however, that since plaintiff could also have sought Civil Rights Act relief by way of damages, he is not here asserting "a federal right for which the sole remedy is in equity," Holmberg v. Armbrecht, 327 U.S. at 395, 66 S.Ct. at 584, and hence the situation is one of "concurrent" legal and equitable jurisdiction, in which case the statute of limitations does apply. Compare Holmberg v. Armbrecht, *supra*, and Russell v. Todd, 309 U.S. 280, 60 S.Ct. 527, 84 L.Ed. 754 (1940), with Cope v. Anderson, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947). *Id.* at 59-60, n. 5.

Plaintiffs' contention that either a 40 year or a 10 year statute of limitations is applicable to Count I involves the same disregard of the specific instruction in *Wakat* as plaintiffs' urging of the exercise of equitable discretion. Plaintiffs apparently proceed on the theory that where an action under the Civil Rights Act involves contracts, a federal court must apply the forum state's period of limitations applicable to contract actions, which in this case is asserted to be the Illinois ten-year provision, Ch. 83, § 17, Illinois Revised Statutes; or that where the civil rights action involves real estate, state limitations specifically relating to real estate are applicable, which in this

case is asserted to be the 40 year period provided in Ch. 83, § 12.1, Illinois Revised Statutes, 1967. But this position is essentially no different from the contention advanced in *Wakat* that because the alleged violations of the Civil Rights Act were in the nature of false imprisonment, the statute of limitations applicable to the civil rights action was the two-year statutory period for the tort of false imprisonment, Section 14 of the Limitations Act, Ch. 83 § 15, Illinois Revised Statutes, 1967. As is clear from the holding in the *Wakat* opinion quoted above,[11] the Court rejected the notion that Section 14 of the Limitations Act was in any sense related to an action under the Civil Rights Act. The Court stated that to the contrary it found the civil rights action to be "an action not otherwise provided for" and thereby covered by the five-year provision that is Section 15 of the Limitations Act. Thus the Court in *Wakat* understood an action under the Civil Rights Act to be independent of the limitations provided for specific causes of action which might be suggested by the allegations that constitute a claim under the Civil Rights Act. It is clear, therefore, that neither the 10 year period relating to contracts, nor the 40 year period relating to transactions in real estate, is applicable to Count I of this complaint. The rather obvious instruction of the Seventh Circuit Court of Appeals in Wakat v. Harlib is that the five-year period provided in Chapter 83, Section 16, Illinois Revised Statutes, must be applied to bar contracts terminated more than five years before the filing of this lawsuit.

It follows from the foregoing that the plaintiff class as previously defined must be redefined so as to eliminate therefrom all negro purchasers of residential real estate under land contracts from the named sellers whose contracts terminated prior to January 6, 1964.

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[11] See text *supra* at App. 37.

Count IV — The Federal Securities Laws

Seeking to establish a cause of action under Section 27 of the Securities and Exchange Act of 1934, plaintiffs reassert the allegations included in the other counts but attempt to describe the alleged activity as the selling of securities by false and misleading solicitation through interstate commerce. That is, plaintiffs maintain that the installment contracts are "securities" as that term is properly understood under the federal securities laws.

But however imaginatively the allegations in this count have been phrased with respect to the federal securities laws, the installment contracts are not securities under the decided cases. And this is clear even under the most general statements of the criteria for determining when a transaction involves a "security". For one key example, the Supreme Court stated in S. E. C. v. W. J. Howey Co., 328 U.S. 293, 301, 66 S.Ct. 1100, 90 L.Ed. 1244 and recently repeated in Tcherepnin v. Knight, 389 U.S. 332, 338, 88 S.Ct. 548, 554, 19 L.Ed.2d 564 (1967), that "[t]he test (for an investment contract) is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." Similarly instructive is the comment by Professor Loss, widely recognized in the cases, that

> The line is drawn, however, where neither the element of a common enterprise nor the element of reliance on the efforts of another is present. For example, no "investment contract" is involved when a person invests in real estate, with the hope perhaps of earning a profit as the result of a general increase in values concurrent with the development of the neighborhood, as long as he does not do so as part of an enterprise whereby it is expressly or impliedly understood that the property will be developed or operated by others. 1 Loss, Securities Regulation, 491-2 (2nd ed., 1961).

Plaintiffs point to the executory nature of these contracts, to the facts that both plaintiffs and defendants had interests they could sell to third persons, and to the fact that plaintiffs were entitled on full compliance with their contracts to receive property of appreciated value. They also insist that both plaintiffs and defendants could have expected to profit from efforts to maintain the properties.

But still, incontrovertibly, the allegations in the complaint establish that plaintiffs, at the time of purchase, intended to acquire personal residences. To conclude that the natural desire of any purchaser that his purchase should appreciate in value makes a "security" of what has been purchased, is obviously to so muddle the term as to make it meaningless. The properties purchased were subject to plaintiffs' control. And even if defendants are considered to have been engaged in a "common enterprise"; an essential allegation of the complaint is that it was defendants alone who sought to profit from any scheme, while plaintiffs, who only intended to purchase personal residences, were their innocent victims. In other words, the transactions cannot be likened to an investment in securities without complete confusion of the alleged relation of the parties to this litigation.

That a cause of action is not stated under the federal securities laws is also shown by the insufficiency of the complaint in its allegations of false representation or concealment of a material fact or device, scheme or artifice to defraud under Section 17(a) of the Securities and Exchange Act of 1934. For instance, plaintiffs allege that defendants concealed appraisals obtained from their mortgage lenders as well as the prices paid to former white owners of the properties. But the usual practice in real estate dealings is not to volunteer this information. Or again, plaintiffs allege that defendants were guilty of mis-

representation of the values of the properties they sold to plaintiffs. But as to this alleged misrepresentation of value, plaintiffs specify nothing beyond what is considered in the law to be mere "puffing" by a seller, and in no degree fraudulent conduct. Thus, conduct here asserted to be in violation of the federal antitrust laws is recognized in other areas of the law as the usual and legitimate practice in the buying and selling of real estate. And what is true of the particular allegations just mentioned illustrates in general the misplacement of the securities concept in this case.

Finally, it would be a gross and unsupported enlargement of the presently exercised jurisdiction and responsibility of the Securities and Exchange Commission to hold that the common sale of residential real estate by installment contract is subject to the federal securities laws. Indeed, plaintiffs indicate their recognition of this by stating in their brief that "the federal law should be interpreted to protect purchasers such as plaintiffs in the case at bar because "the type of interests reposed in plaintiffs and defendants as a result of the sale of installment contracts are not sufficiently regulated under Illinois law * * * ." In asking the Court to be so creative, plaintiffs acknowledge that the federal and state securities and fraud laws as presently stated and understood do not provide the requested protection. Accordingly, the motions to dismiss Count IV of the complaint must be granted.

Count V — Unconscionability, Fraud, Usury and Breach of Implied Warranties

In support of the claim of fraud asserted in Count V of the complaint, plaintiffs allege that defendants concealed the prices paid to the former white owners of the real estate, concealed appraisals of the properties, and concealed the existence of violations of the municipal building

code. These allegations are supposed to constitute the material misrepresentation of fact essential to a cause of action for fraud. *See, e.g.*, Bennett v. Hodge, 374 Ill. 326, 332, 29 N.E.2d 524, 527 (1940); Zanbetiz v. Trans World Airlines, Inc., 72 Ill.App.2d 192, 219 N.E.2d 98 (1966).

However, the alleged deception as to value is in no manner distinguishable under Illinois law from the range of matter covered by the general rule that statements as to value in such transactions are to be considered merely "opinion" rather than statements of material fact.[12] In Coleman v. Goran, No. 47992 (1st Dist. June 14, 1960),[13] the Illinois Appellate Court for the First District repeated the general rule and stated its primary exception as follows:

> Statements as to value of property are ordinarily considered mere expressions of opinion, and, for that reason, are not sufficient to warrant a recision of the contract, even though they are false and relied upon by the other party. The rule is otherwise where the misrepresentation relates a specific, extrinsic fact, peculiarly within the knowledge of the party making the statement, which materially affects the value. *Id.* at 4.

Count V of this complaint does not include any allegation which would bring it within the purview of the exception. In particular, the allegation that defendants did not reveal violations of the municipal building code and thereby "concealed the violations, does not amount to the sort of reliance which can substantiate a cause of action under the exception to the general Illinois rule. *Coleman* involved a

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[12] *See, e.g.*, Pustelniak v. Vilimas, 352 Ill. 270, 275, 185 N.E. 611, 613-614 (1933); Bouxsein v. First Nat'l Bank, 292 Ill. 500, 504, 127 N.E. 133, 134 (1920); Scott v. Wilson, 15 Ill.App.2d 456, 146 N.E.2d 397 (1st Dist. 1957).

[13] An abstract of this opinion is published in 26 Ill.App.2d 288, 168 N.E.2d 56 (1st Dist. 1960).

very similar allegation which the Court specifically held to be insufficient, stating in summation of the Illinois law,

> If the purchaser has an opportunity to view the property, it is his duty to make use of that opportunity. Unless the representations concern matters which the prospective purchaser cannot readily determine upon examination, he will be held to have exercised his own judgment rather than to have relied on the statements of the seller. [Citing Malnick v. Rosenthal, 313 Ill.App. 249, 255 [39 N.E.2d 767] (1942) and Bundesen v. Lewis, 368 Ill. 623 [15 N.E.2d 520] (1938).] *Id.* at 6.

Furthermore, while we cannot accept the proposition that concealment of appraisal is never relevant to a claim of fraud, a general allegation of such concealment in the absence of other specific pleading of fraud obviously cannot suffice for a statement of a cause of action for fraud. It obviously cannot simply because while sellers will often obtain such appraisals; the revelation of the appraisals to their buyers is not even the custom nor usual expectation in real estate transactions. The same is true of the allegation that defendants concealed the prices at which they purchased the real estate in question from the former white owners.

This failure to state specific elements making up a cause of action for fraud indicates a more general, yet independent, failing of the claim. There is absent the definiteness that is required by Rule 9(b) of the Federal Rules of Civil Procedure as a condition of pleading fraud in the federal courts.[14] This, however, does not mean that a com-

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[14] Federal Rule 9(b) provides an exceptional requirement for federal notice pleading, stating that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *See*, Krulikowsky v. Metro Dist. Council, 30 F.R.D. 24, 26 (E.D.Pa.1962); Dixie Mercerizing Company v. Triangle Thread Mills, 17 F.R.D. 8, 9 (S.D.N.Y.1955); 2A Moore, Federal Practice, ¶ 9.03 at 1923-37 (2d Ed. 1968).

plaint properly alleging fraud in a class action must specify the particular details of every transaction and occurrence that comprises the allegedly unlawful activity. Such a requirement would undermine the utility of the class action device, particularly in a case of this magnitude, involving a multitude of similar individual relationships. The burden of pleading would eliminate the device in the very cases where it might be most appropriate and most useful. But even considering the special problem of pleading fraud in a class action, it is still reasonable and necessary that the class action complaint state generally facts establishing each and every element essential to a cause of action for fraud.

As clearly defined in Illinois law, the elements are: (1) The misrepresentation must be of a statement of fact; (2) it must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; and (6) the statement must be material. Bennett v. Hodge, 374 Ill. 326, 332, 29 N.E.2d 524, 527 (1940). *Accord,* Zanbetiz v. Trans World Airlines, Inc., 72 Ill.App.2d 192, 219 N.E.2d 98, 102 (1st Dist. 1966). Besides the failure to specify anything that could be considered a material misstatement under Illinois law, the complaint in this case fails to articulate the other elements required. The instruction of Rule 9(b) is certainly at least that the basic elements of a cause of action for fraud cannot be left to implication.

Moreover, plaintiffs' claim of breach of implied warranties is similarly defective. Nothing but the bare conclusion that breach of warranties have occurred is stated. Though the claimed breach of warranties may be impliedly related to the general background of activity and circum-

stance pleaded in Count V and previously in Count I, there is no delineation of the substance of the alleged cause of action, nothing which would satisfy even the liberal federal notice pleading requirement.[15]

As an aspect of the cause of action plaintiffs seek to establish under Count V of the complaint, plaintiffs urge the equitable concept of unconscionability. They allege that the strategy of exploitation engaged in by defendants, including the exploitation of plaintiffs' lack of education and lack of experience in real estate matters relative to defendants, resulted in the "unconscionable provisions" and "unconscionable prices" allegedly characteristic of these contracts. Plaintiffs thus claim not that the device of the installment contract or the provisions relating to evictions, confessions, forfeitures and defaults are unconscionable *per se*, but that they represent unconscionability as they resulted in this case.

The equitable concept of "unconscionability" becomes meaningful always in the context of otherwise defined factors of inequality, deception and oppression. A standard statement of the concept reads,

> When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue influence, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these

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[15] As this Court stated in Huey v. Barloga, 277 F.Supp. 864, 871 (1967):

> Although pleadings are given a liberal construction in the federal courts, the Rules contemplate some factual statement in support of the claim. General allegations of this kind unsupported by any factual statements have usually been rejected as insufficient.

circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative. 3 Pomeroy, Equity Jurisprudence, § 928, pp. 640-641 (1941).

The Illinois cases present a great variety of situations where a concurrence of any of the above elements will be sufficient for invocation of the principle of unconscionability. But one point at least is clear upon review of the cases. Application of the doctrine requires extreme circumstances beyond what can be understood or implied from any of the allegations in this complaint. As already discussed, the compiaint does not state the bare substance of a claim of fraud. Furthermore, plaintiffs' lack of education and lack of experience relative to defendants can obviously not in itself independently constitute a significant factor of unconscionability in a free market system where such relationships are the inevitable day-to-day matter of the functioning economy. Moreover, the general rule is that mere excessive price is not a sufficient circumstance to independently support a claim of unconscionability. *See*, Chicago Title & Trust Co. v. Illinois Merchants' Trust Co., 329 Ill. 334, 346, 160 N.E. 597, 603 (1928); Scott v. Wilson, 15 Ill.App.2d 456, 146 N.E.2d 397 (1st Dist. 1957). Even the rare Illinois cases that consider a disparity in values exchanged as a sufficient independent circumstance involve egregious disparity well beyond what is alleged in this case.[16] Also, these rare cases are significantly distinct from the instant case in that the court is typically being asked to enforce the unconscionable contract; and when the court refuses, it states

[16] For instance, Koch v. Streuter, 232 Ill. 594, 604, 83 N.E. 1072 (1908), was a case where an exchange of a $25,000 value for little more than zero was declared by the court to be a sufficient independent circumstance.

as its reason the classic proposition that "[c]ourts of equity will not lend their aid to assist one in realizing upon an unconscionable bargain." Koch v. Streuter, 232 Ill. 594, 604, 83 N.E. 1072, 1077 (1908). *See, also*, In re Chicago Reed & Furniture Co., 7 F.2d 885, 886 (7th Cir. 1925).

Finally, plaintiffs have also alleged that due to the shortage of housing for negroes, plaintiffs were placed in a position of unequal bargaining power severe enough to render the contracts that resulted from defendants exploitation of this situation unconscionable. But while the discriminatory exploitation of a system of *de facto* segregation is unlawful under the Civil Rights Act, the artificial shortage of housing for negroes does not constitute an appropriate foundation for application of the principle of unconscionability. As the principle is generally understood in the law of the State of Illinois, it does not normally extend to situations resulting from artificially contrived market conditions. By contrast, the economic substance of the injustice described in this complaint relates naturally to the concerns of the antitrust laws and the Civil Rights Act. While on the basis of some extreme situation of unequal bargaining power due to the conjunction of absolute need and dire shortage, a court might conceivably apply the doctrine of unconscionability, such circumstances are not described in the instant complaint and the necessarily awkward extension of the principle to support Count V of this cause would necessarily create a misfit in the law.

In Count V of the complaint plaintiffs also assert that defendants are guilty of violation of the usury law of the State of Illinois, Illinois Revised Statutes ch. 74, § 5 (1967). Plaintiffs offer the following statement on the basis for their claim:

> (j) Defendant-sellers extracted from plaintiffs unlawful and usurious rates of interest through the devices

and subterfuges of (i) charging plaintiffs excessive amounts for insurance, (ii) charging plaintiffs for commissions for obtaining insurance, (iii) collection of deposits for real estate taxes many months prior to the time the taxes were due or paid; (iv) charging excessive amounts for so-called closing costs, and (v) increasing the purchase prices to amounts far in excess of the fair value of the properties. The real purpose and effect of the transaction was to provide for excessive and usurious rates of interest to be taxed against and paid by plaintiffs.

It has always been the understanding of the courts that the Illinois usury statute relates to loans as distinct from purchase and sale. *See, e.g.*, In Re Oakes, 267 F.2d 516, 518 (7th Cir. 1959); Manufacturers Finance Trust v. Stone, 251 Ill.App. 414, 420 (4th Dist. 1929); Primley v. Shirk, 60 Ill.App. 312, 314 (1st Dist. 1895); aff'd, 163 Ill. 389, 45 N.E. 247 (1896). Plaintiffs, however, contend that to conclude that the contracts in this case are not usurious under the law would be to allow a triumph of terminology over reality. They insist that though the transactions in this case are commonly described as purchase and sale, the various devices described by the above allegations were all means by which defendants secured usurious rates of interest for what were essentially loans.

We reiterate that it is obvous from the substance of this complaint that the intention of each of the plaintiffs, at the time of execution of the contracts, was the purchase of a personal residence. The rule in Illinois has long been that "on a sale of property * * * there can be no usury charged simply because the price is fixed at one sum if paid at one time, and at another sum if paid at another." Primely v. Shirk, 60 Ill.App. 312, 314 (1st Dist. 1895), aff'd 163 Ill. 389, 45 N.E. 247 (1896). Plaintiffs submit no support for the proposition that price in excess of fair mar-

ket value can make a loan of what is commonly understood to be a purchase and sale. And even if this were a case where the underlying is a loan, the excess in price could not be considered interest under the Illinois law as presently interpreted. A similar conclusion was stated by Judge Duffy in his concurring opinion *In Re Oakes*, where he said.

> As an original proposition, I would say the transaction in question was a loan. When a seller receives consideration from a buyer solely because of delayed payment, this consideration is, in fact, interest whether it is called "service charges," "finance charges," "risk fees," or some other name. Nevertheless, in this case we must follow Illinois law and decisions by Illinois Courts. Decisions such as Manufacturers Finance Trust v. Stone, 251 Ill. App. 414 compel a holding by us that the transaction in question is a sale and not a loan. 267 F.2d 516, 519-520 (7th Cir. 1959).

Judge Duffy's conclusion as to the incidental charges is equally applicable to the charges alleged in this case. In particular, the advance collection of deposits for real estate taxes is a common practice to assure the avoidance of tax liens. Plaintiffs submit no case which suggests that such practice has ever been held to bring a sale of real estate within the usury prohibition. It has indeed expressly been held in Illinois that payment of real etsate taxes by a borrower did not render a transaction usurious though the stated interest rate was the highest legal rate. Kidder v. Vandersloot, 114 Ill. 133, 28 N.E. 460 (1885). Also, it has been recently held that a mortgagor's payment of insurance premiums in addition to interest on a loan did not render the loan usurious notwithstanding that the insurance was issued by and assigned to the mortgagor itself, so long as the insurance was normal in respect to premiums and costs. Equitable Life Assurance Society of United

States v. Scali, 38 Ill.2d 544, 232 N.E.2d 712 (1967). In sum, whatever the "reality" of the transactions in this case, so far as the claim of usury is concerned, our obligation to follow the Illinois law requires that the motions to dismiss be granted.

Motion of Various Banks to Dismiss and for Summary Judgment

Certain of the banks named as defendants in their capacity as trustees under land trust agreements have moved to dismiss or for summary judgment on the ground that they hold only legal title to the properties in question and have no authority to deal with the properties beyond their limited responsibilities as trustees. They describe their responsibilities under the agreements and the law of Illinois as comprehended by the duty to follow directions of beneficiaries and to perform certain ministerial responsibilities. They insist that they lack any power of management or control which could be the basis for participation in the alleged conspiracy and pattern of discriminatory conduct. The complaint, however, alleges that these defendants actively participated together with the other defendants in the unlawful activity. At this early stage of the litigation, on the basis of the complaint, motions and affidavits before the Court, the allegation that the banks have participated is not so frivolous nor unlikely as to render it appropriate to grant the banks' motions. On the basis of the allegations, it is certain that in some circumstances at least, the banks would have had notice of the disparities in price, the appraisals and the "turnaround" nature of some purchases and sales. In other words, the allegations as directed against the movant banks have stated causes of action and raised material issues of fact which under Rules 12(b) (2), 12(b) (6) and Rule 56 of the Federal Rules require denial of the banks' motions.

Moreover, although the banks claim that they are not the real parties in interest and could not, therefore, participate in the unlawful activity alleged, the banks in many instances are the only identified sellers since they executed the contracts as sellers, and the buyers have no way to identify the real parties whom the banks assert have complete management and control over the trust properties. Until such disclosure is made, plaintiffs are relegated to the public record as it now stands in seeking vindication of any right or recovery of any loss. For the present, therefore, plaintiffs properly assert their claims against the banks even though the banks may subsequently demonstrate that they are only nominal parties in interest.

Finally, it is also right that the banks should remain parties at this stage of the litigation because their presence may well be required for the successful implementation of any relief granted. While a trustee bank could generally be expected to cooperate in the implementation of any decree directed to the beneficiaries under a trust, the lack of identification of the real parties in interest creates possible complications which make it desirable to retain the banks at this time as named defendants. In any case, the presence of the trustee will indubitably facilitate the implementation of any decree because the trustee may be required to act as a prime mover in the resolution of the litigation with respect to a particular contract.

Motions to Dismiss "Contract Buyers League"

Defendants have moved to dismiss "Contract Buyers League" as a party plaintiff. The position they take is that the Contract Buyers League is not a proper party to this case because Rule 17 of the Federal Rules of Civil

Procedure requires that "[e]very action shall be prosecuted in the name of the real party in interest", and because the Contract Buyers League does not survive Rule 17(b), which in determining capacity to sue or be sued provides,

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States * * *

In response to the motions to dismiss, plaintiffs analogize the situation of the Contract Buyers League to various organizations which in promoting the interests of their members have been found to have standing in the federal courts. But the cases cited by plaintiffs are inapposite. The analogies all ultimately fail because they disregard the fundamental premises of Rule 17.

Rule 17 is intended to ensure that the contours of a given litigation extend no further than the interests apparently necessary for the resolution of the controversy stated. This is the import of both the requirement that "[e]very action shall be prosecuted in the name of the real party in interest," and of the requirement that the participation of an unincorporated association be justified by the showing that the case involves the "enforce-

[ement] for or against it [of] a substantive right existing under the Constitution or laws of the United States."

Plaintiffs rely in large measure on the similarity of the role in litigation of the Contract Buyers League and the NAACP. Specifically, plaintiffs cite NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958), even though that case is obviously distinguishable, like other cases involving the NAACP on the ground that the NAACP is a corporation while the Contract Buyers League is an unincorporated association, a distinction specifically recognized in Rule 17. And in the Alabama case, the NAACP itself was being sued by the State of Alabama which was seeking to enjoin it from engaging in activity within the State. The case was thus brought to enforce an alleged substantive right against the association, a situation which is not present in this case, but which is the condition for a finding that a grouping of individuals that is merely an unincorporated association has standing. One example of this situation where an unincorporated association is properly a party is another case cited by plaintiffs, Todd v. Joint Apprenticeship Committee of Steel Workers of Chicago, 223 F.Supp. 12 (N.D.Ill.1963). The court in *Todd* pointed out that Rule 17(b) (1) authorized the suit against the unincorporated association because the suit was brought to enforce a substantive right against the association as the rule explicitly requires. *Id.* at 17.

What the cases point to and what the rule generally stated means is that the test for whether an unincorporated association is a proper party is whether relief that may be granted will either redound to the benefit of the party alleged to have standing, or will cause the alleged

party to suffer damage. Stated simply, the crux of the matter in the instant case is that, except as it is named in certain defendants' counterclaims,[17] there is no relief which this Court is being asked to grant for or against the Contract Buyers League. The Court has asked plaintiffs for information descriptive of the organization called "Contract Buyers League," particularly as to its activities and purposes. In their argument to the Court, plaintiffs have subsequently described the Contract Buyers League so as to restrict the life and purpose of the organization solely to this lawsuit. It appears to be an organization created exclusively to concern itself with the particular matters presented for resolution in this action. But the members of the Contract Buyers League who hold the contracts that are the substance of this litigation are fully in this case as members of the defined class of plaintiffs. Any relief secured will be secured by them directly as members of the class, and as the case is presently stated, the Contract Buyers League consequently cannot be the object of any relief. Moreover, the cases cited by plaintiffs, except for what appears to be a single possible aber-

[17] The provision of Rule 17 that an unincorporated association "* * * may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States" clearly does not refer to a defendant's counterclaim or apply to a situation in which a counterplaintiff is seeking to have a counterdefendant dismissed as a plaintiff. The counterclaim is obviously dependent on the validity of the counterdefendant's status as a plaintiff and the granting of defendants' motion to dismiss Contract Buyers League as a plaintiff will necessarily require defendants' dismissal of the counterclaim they have filed against the Contract Buyers League.

ration,[18] do not indicate a determination by any court that both a class of persons and the association that represents the class can be proper parties. In the cases cited by plaintiffs, contrary to the instant case, the court was being asked by the organization alone for relief. One of these cases, for instance, is Citizens Association of Georgetown v. Simonson, D.C. Cir., 403 F.2d 175, where the suit was brought by the organization for its members, who were not present in the case in their own right.

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[18] The only case which appears to stand for this conclusion is Alston v. School Board, 112 F.2d 992, 130 A.L.R. 1506 (4th Cir. 1940). But the structure of the opinion makes it clear that the court's statement on this matter was in the nature of dicta. In a rather offhanded manner, after the questions presented in the case had been decided, the Court remarked, "[w]e should say, too, that we have no doubt as to the Norfolk Teachers Association's being a proper party to the suit. According to the complaint, it is a voluntary unincorporated association and 'is composed of Negro teachers and principals in the public colored schools of Norfolk'; and the right of such an association to sue in its common name for the purpose of enforcing substantive rights under the Constitution of the United States is provided for under Rules of Civil Procedure. Rule 17(b), 28 U.S.C.A. following section 723c. The point is not important, however, as the suit is brought as a class suit and the members of the association belong to the same class as the plaintiff Alston." *Id.* at 997.

The court didn't consider the problem serious enough in *Alston* to see the illogic of the position stated. For under the terms of Rule 17, how could the teachers' association be included if the substantive right was being enforced for the class that included the members of the Association? Either the class or the Association was the proper party, but not both. Moreover, the Court was also incorrect to conclude that the point makes no difference. The possibility of a counterclaim against the unincorporated association, in this case the Contract Buyers League, demonstrates that the admission of an unincorporated association superfluous to any remedy to be granted, may well distort or extend the case stated in the complaint so as to destroy the limits which Rule 17 is intended to ensure.

Finally, there is no logic to the argument that the presence of the Contract Buyers League in this suit is somehow required as a condition for plaintiffs to organize for the vindication of their rights. Any organizational efforts outside the courtroom do not in any necessary manner depend on the presence of the Contract Buyers League as a party to this suit. Thus neither under Rule 17 nor for any other reason is the presence of the Contract Buyers League as a party to this suit justified. The motions to dismiss the Contract Buyers League must therefore be granted.

Appropriate orders consistent with all the foregoing will be entered.

APPENDIX C

WILL, D. J.: Plaintiffs in this action seek various relief under the provisions of the Civil Rights Act, 42 U. S. C. §§ 1981, 1982, 1983, 1985(3), and the Thirteenth and Fourteenth Amendments to the United States Constitution. Plaintiffs also seek relief for alleged violations of the federal Securities Laws, and for alleged violations of the Illinois common law regarding fraud, usury and unconscionable contracts.

It is alleged in the complaint that defendants have exploited a custom and usage of residential racial segregation in the City of Chicago so as to obtain unlawful benefits in their dealings with negro purchasers of used residential real property. Specifically, it is alleged that the defendant sellers acted to take advantage of the pattern of racial segregation and the scarcity of housing for negroes by obtaining purchase money mortgages, often in excess of the value of the properties involved, from defendant lenders who knew that defendant sellers intended to resell the properties to negroes under installment land contracts at prices far in excess of appraised value, and then selling the properties to plaintiffs at prices far beyond the cost or value of the real estate. It is further contended that these sales were consummated by means of installment contracts containing unconscionable provisions, particularly penalties and forfeitures reflecting alleged inequality of bargaining power; and that as a result of their concerted action in exploitation of the system of racial segregation, defendant sellers were able to fix the prices of the properties in violation of the federal and Illinois antitrust laws. Additionally it is alleged that defendant sellers were guilty of misrepresentation and concealment in vio-

lation of the anti-trust laws, and that the execution of the contracts violated the Illinois common law regarding fraud, usury and unconscionable contracts.

The plaintiff negro purchasers seek to sue as a class for their own relief and that of all others similarly situated. Plaintiffs also contend that, under Rule 23 of the Federal Rules of Civil Procedure, defendants should be regarded as constituting a defendant class. It is necessary therefore to resolve the immediate and basic question in this cause — whether and to what extent this litigation can be brought as a class action under Rule 23 of the Federal Rules of Civil Procedure.

For an action to be properly maintainable as a class action, it must meet all the requirements set forth in Section 23(a) of the Rule and also fall within one of the subsections of 23(b). As to the provisions of 23(a) we first note that the requirement that the class to be so numerous that joinder of all members is impracticable appears to be satisfied in this case. Named plaintiffs number more than fifty persons and their complaint alleges a commonality of interest with many additional un-named persons. The second requirement of 23(a), that there be questions of law or fact common to the class, is satisfied by the allegation of conspiracy and the allegation of concerted action by named defendants in similarly unconscionable circumstances of sale made possible by a common condition of residential segregation. That the same violations of law are alleged with respect to all of the contracts, and that similar relief is requested, also demonstrate satisfaction of the second prerequisite. And for these same reasons that the second prerequisite is satisfied, the third prerequisite, that the claims or defenses of the represen-

tative parties be typical of the claims or defenses of the alleged class, is satisfied. It should be noted, of course, that irrespective of this determination as to the second and third prerequisites, it is clear under Rule 23 that a remaining question is whether under 23(b)(3) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.

Our conclusion as to the fourth prerequisite, that is, whether the representative parties will fairly and adequately represent and protect the interests of the class, will to some extent necessarily depend upon whether this action can be deemed to fall within subsections 23(b)(2) or 23(b)(3) of the Rule, since defendants contend that the claim for relief presented by any particular plaintiff cannot be regarded as substantially related or similar to the claims of other purchasers. But apart from this fundamental consideration, no other question has been raised as to the adequacy of the present representation. The named plaintiffs themselves have significant economic interest typical of that of the entire asserted class. *See, Richland v. Cheatham*, 272 F. Supp 148, 153 (S. D. N. Y., 1967). The named plaintiffs are represented by competent and experienced counsel, and there is no likelihood of a collusive suit or that named plaintiffs have interests antagonistic to the interests of other purchasers they purport to represent. *See, Hansberry v. Lee*, 311 U. S. 32 (1940); *Eisen v. Carlisle & Jacquelin* [1968 TRADE CASES ¶ 72,381], 391 F. 2d 555, 562 (2nd Cir. 1968).

The fundamental question of representativeness which runs throughout Rule 23 is the basis upon which defendants contend that this litigation is not properly a class action. Defendants' principal argument is that claims of over-

reaching, fraud and abuse of confidence, by their nature must relate exclusively to an individual contract between an individual buyer and seller. They urge that the claims in this case entail an investigation of the individual circumstances, economic and otherwise, of the execution of any particular contract concerning a particular property; that the issue presented by the allegations is the extent to which any particular defendant exploited the condition of segregation to his individual advantage at the expense of an individual purchaser. In support of this analysis, defendants offer a statement of sixty-nine allegedly distinct issues of fact. Defendants also point out that there is some variation of the terms and conditions stated in the various contracts. In sum, it is defendants' position that the complaint in this cause is an artificial tying together of separate claims by separate plaintiffs against separate defendants and requiring separate proofs.

Turning to the subsections of 23(b), one of which must be satisfied for the maintenance of a class action, the provision which most specifically addresses the class action question as it is presented by the contentions in this case is 23(b)(3). This subsection provides that a class action is appropriate where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

It should be noted that this subsection requires a different determination than is called for by the statement of prerequisites in 23(a). That is, the question posed by 23(b)(3) is not whether there *are* common questions of law or fact, but rather, whether the common questions

found under 23(a) "predominate". Thus the Advisory Committee noted, for example, that "private damage claims by numerous individuals arising out of concerted anti-trust violations may or may not involve predominating common questions." Advisory Committee's Note, 39 F. R. D. 69, 103 (1966). This is true even as to complaints alleging conspiracy. Through considering all the facts of a particular case, the courts have often found that an allegation of conspiracy is sufficient to support an action under 23(b)(3). *See, e.g., Eisen* v. *Carlisle & Jacquelin* [1968 TRADE CASES ¶ 72,381], 391 F. 2d 555, 556 (2nd Cir. 1968); *State of Minnesota* v. *United States Steel Corporation* [1968 TRADE CASES ¶ 72,469], 44 F. R. D. 559, 570 (D. Minn. 1968); *Siegel* v. *Chicken Delight, Inc.* [1967 TRADE CASES ¶ 72,192], 271 F. Supp. 722, 726 (N. D. Calif. 1967). The factors to be taken into account under the word "predominates" as used in the new Rule 23(b)(3) may, however, convince the court that a class action cannot properly be maintained in a particular case. *See, e.g., School District of Philadelphia* v. *Harper & Row Publishers* [1967 TRADE CASES ¶ 72,082], 267 F. Supp. 100 (E. D. Pa. 1967); *D & A Motors, Inc.* v. *General Motors Corp.* [1956 TRADE CASES ¶ 68,347], 19 F. R. D. 365 (S. D. N. Y. 1956); *United States* v. *E. I. Dupont de Nemours & Co.* [1952 TRADE CASES ¶ 67,348], 13 F. R. D. 98 (N. D. Ill. 1952).

As the word "predominate" is used in 23(b)(3), it essentially requires a determination of the utility of a class action for all alleged parties and the resolution of controversy. This is the clear import of the Advisory Committee's comment that "it is only where this predominance exists that economies can be achieved by means of the

class action device." 39 F. R. D. at 103. Moreover, the Rule itself articulates broad indicia for this calculation in its provision that

> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

As defendants assert, it is germane to our determination under 23(b)(3) that the economic substance of the instant suit is many individual contracts with somewhat variable terms. But the gist of this complaint is that a broad pattern of similar activity has resulted in the violation of the civil rights of many people as well as the violation of state and federal laws. The logic of the complaint is that the execution of any particular unfair contract depended upon a series of discriminatory transactions, that the inequity of any particular contract is the result of a greater scheme of exploitation involving, among other factors, the contracts executed by the other plaintiffs. The complaint alleges that an extensive activity of fraud and discriminatory connivance was perpetrated within the framework of activity of buying from white homeowners to sell to negroes. In addition, the allegation is not simply that defendants took advantage of discriminatory market conditions existing by virtue of the system of *de facto* segregation, but that defendants themselves worked to create the conditions for discriminatory benefit by "blockbusting"—a strategy of preying on racial fear so that

white homeowners were stampeded into selling to defendants who then promptly resold at inflated prices to the victims of the *de facto* shortage of housing for negroes in the City of Chicago.

Besides the predominance of common questions of fact, the instant complaint also presents the predominance of legal issues common to the asserted class that is required by 23(b)(3). The common issues of law, for example, include the central questions whether defendants discriminated against negroes, whether a private right of action under Sections 1981, 1982 and 1983 can properly be recognized, whether the "state action" requisite to an action for denial of equal protection under the Fourteenth Amendment is present, whether an installment contract is a "security" within the meaning of the Securities Act of 1933 or the Securities Exchange Act of 1934.

Therefore, because both as to questions of law and fact the necessary "predominance" is present in this case, a class action may be maintained under 23(b)(3). And because the challenge to transactions with named defendants at once identifies and limits the class of plaintiffs in this litigation, we find that the allegations of the complaint identify a plaintiff class of Negroes who, since January 1, 1952, have entered into installment contracts for the purchase from named defendants of used residential property located in Chicago.

For the same reason, we find that this action does not identify an appropriate defendant class. That is, it is not claimed that all sales of used residential property to Negroes since 1952 are within the specific allegations of this complaint, and there is no other definable limit for the group of sellers, other than the group of named defendants.

Because they are named defendants, there is no substantial reason to define them as a class. Also, because of this lack of reason for the definition of named defendants as a class, though it is alleged that named defendants acted in concert and also in conspiracy, it would seem most consistent with due process to focus on the group of named defendants as individuals in light of the nature of the allegations, particularly the allegations of fraud and an overreaching.

It should be noted that our determination that plaintiffs may sue as a class is based on a recognition that there *are* undoubtedly individual questions with respect to particular contracts, and that though these individual questions will relate primarily to damages, they may also, to a lesser degree, pertain to liability. But the basic integrity of the claims in this litigation nevertheless demonstrates the propriety of a class action. Moreover, the courts have not been adverse to recognizing a class action where individual defenses may exist and require individual proof, so long as the basic matter of utility and representativeness favors the class action procedure. *See, e.g., Brennan* v. *Midwestern United Life Insurance Company,* 259 F. Supp. 673 (N. D. Ind. 1966).

The considerations discussed above also support the conclusion that the remaining requirement of 23(b)(3), the requirement that a class action be "superior to other methods for the fair and efficient adjudication of the controversy" is also satisfied by the above definition of the class of plaintiffs. In particular, it should be recognized that the handling of this litigation as a class action is clearly superior at this stage of the proceedings in terms of the Rule 23 purposes of avoiding a multiplicity of actions and avoiding delay in securing any legitimate relief.

Also fundamental to this complaint is the contention that plaintiffs were the subjects of fraud and discrimination in part because of their financial inability to adequately protect their civil rights in the courts, and that it is by combining their financial resources that necessary legal expense can be met. While this contention by itself might be regarded as an insufficient and potentially artificial justification for a class action, it is clearly relevant in the overall determination of the other requirements of Rule 23. Its relevance as a ground for a class action was recognized even under the earlier class action provisions of the Federal Rules. For instance, the Seventh Circuit Court of Appeals some time ago referred to this in language which has been often repeated.[1] The Court wrote in *Weeks* v. *Bareco Oil Co.* [1940-1943 TRADE CASES ¶ 56,173], 125 F. 2d 84, 90 (7th Cir. 1941):

> Nor is the financial aspect to be overlooked — that is, the plaintiffs' and defendants' relative financial ability. The relative financial interest in the outcome of this litigation is such, that greater parity of ability is obtained by a joinder of plaintiffs.
>
> To permit the defendants to contest liability with each claimant in a single separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.

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[1] This language was quoted by Judge Robson of this court in *State of Illinois* v. *Brunswick Corporation*, 32 F. R. D. 453, 461 (N. D. Ill. 1963). The language was also quoted approvingly in *Zeigler* v. *Gibralter Life Insurance Company of America*, 43 F. R. D. 169, 173 (D. S. D. 1967) where the Court was considering Rule 23 as amended, and noted "the burden which could conceivably be placed upon the individual claimants should the suits be prosecuted separately."

The nature of this action as discussed in determining the applicability of 23(b)(3) also indicates that it can be properly maintained as a class action under subsection 2 of 23(b), which makes provision for a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." It is obvious that 23(b)(2) is intended to provide a basis for use of the class action procedure additional to that provided for under Sections 23(b)(1) and 23(b)(3). Thus, even though individual lawsuits might avoid the untoward effects following from separate actions in (b)(1) and (b)(3) situations, a class action may nevertheless be appropriate under 23(b)(2). Section 23(b)(2) was built on experience in the Civil Rights field. The Advisory Committee specifically noted in this regard the applicability of the subsection to actions involving alleged violations of civil rights, and that "an action looking to specific or declaratory relief could be brought by a numerous class of purchasers . . . against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers . . . when the applicable law forbids such pricing differential." 39 F. R. D. at 102. Though decisions under this section generally relate to actions against a single defendant, the substance and purpose of 23(b)(2) are satisfied in the instant suit because the allegations of unlawful execution of the contracts and subsequent efforts at collection or eviction constitute a claim that "the party opposing the class has acted or refused

to act on grounds generaly [*sic*] applicable to the class."[2] Indeed, as has been pointed out, the nature and legality of action generally applicable to plaintiffs is the gist of this lawsuit.

We also point out, however, that neither 23(b)(1)(A) nor 23(b)(1)(B) appears applicable to the instant cause.[3] The need to meet a threat of inconsistent adjudications which is the thrust of 23(b)(1)(A) and 23(b)(1)(B) is not substantial here since different results as to adjudications involving different individuals could be distinguished on the grounds of different facts.

In any event, this possible variance does not belie the finding that this cause presents the necessary "predominance" to qualify as a class action under 23(b)(3). More-

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[2] We do not find at this stage of the litigation that the comment of the Advisory Committee that 23(b)(2) " . . . does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages", 39 F. R. D. at 102, is determinative. The allegation of illegal execution of the contracts, the claim for equitable relief to prevent the enforcement of the contracts, and the present efforts by defendants to evict members of the alleged plaintiff class, altogether, controvert the proposition that this is a case where the "appropriate final relief relates exclusively or predominantly to money damages." At least, this must be our conclusion given the present posture of the litigation.

[3] Section 23(b)(1) provides: (b) Class actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

over, the redrafting of Rule 23 was especially intended to give district courts the necessary flexibility to assure the effectiveness of the class action as a remedial device.[4] The rule thus makes provision at 23(C) for any subsequent modification of the class that appears appropriate as the actual contours of the litigation and problems of management are developed before the court.

Finally, reinforcing the conclusion that a class action is presently appropriate is the principle recognized by the courts as implicit in the grant of discretion to modify, i.e., that the earlier the stage of the proceeding, the more liberally should the court construe the applicability of Rule 23. For instance, as was recently stated by the Second Circuit Court of Appeals, "if a class action is markedly superior to all the alternatives, then, at least at the early stages of the litigation, we should construe broadly the other elements of Rule 23." *Green* v. *Wolf Corporation*, Civil No. 32335 (2nd Cir. Dec. 9, 1968); *see, also, Esplin* v. *Hirshi*, 402 F. 2d 94, 99 (10 Cir. 1968); *Siegel* v. *Chicken Delight, Inc.* [1967 TRADE CASES ¶ 72,192], 271 F. Supp. 722, 728 (S. D. Cal. 1967).

In sum, the new Rule 23 was intended by its creators to be an ongoing experiment in sound judicial administration, with the substance of the rule providing the basic limits and standards for the exercise of judicial discretion. As Judge Frankel has observed,

> While there is much novelty and room for doubt in the new Rule, it is, by the same token, a mandate to

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[4] *See* 2 Barron & Holtzoff, *Federal Practice and Procedure* § 562 (1966 Supp., p. 73, *Wright* ed.); Cohn, *The New Federal Rules of Civil Procedure*, 54 Geo. L. J. 1204, 1217 (1966); Note, *Class Actions—Federal Rule 23 Amended*, 31 Albany L. Rev. 127, 130 (1967); Note, *Proposed Rule 23, Class Actions Reclassified*, 51 Va. L. Rev. 629, 642, 650-60 (1965).

> adapt judicial procedure to constantly changing, increasingly complex patterns of litigation. Despite all of the possibilities of departure from our habitual ways, we will not be writing on a clean slate. However the forms of procedure may change, there should be no serious threat to the fundamental premises—that notice should be fair and ample in the circumstances, that competing interests should be fully and fairly heard before decision, that no substantial right should be concluded before it has been tried out thoroughly in adversary proceedings. Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F. R. D. 39, 52 (1968).

The cases are uncertain as to what constitutes adequate notice under Rule 23, and this is largely because the notice requirement of Rule 23 sets forth the kind of broad discretionary limits characteristic of the Rule's adaptability to particular circumstances. It is provided in 23(c)(2) that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Applying this standard to the instant cause, we find that adequate notice should require individual notice to the extent that the identities of the class members are ascertainable. It is therefore necessary that each of the defendants furnish a list of persons known by them to be Negro purchasers from them on installment contracts of used residential real estate in the City of Chicago since January 1, 1952. This will require a good faith attempt to list as many of the members of the class as possible through investigation consistent with the "reasonable effort" standard specified in 23(c)(2).[5] As

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[5] We reject the singular judgment in *School District of Philadelphia* v. *Harper & Row Publishers, Inc.* [1967 TRADE CASES ¶ 72,082], 267 F. Supp. 1001 (E. D. Pa. 1967) that the Court itself must be burdened with sending proper notice.

for the rest of the class, notice by publication in newspapers of general circulation in Chicago should be satisfactory. This latter form of notice has been utilized by this Court in other circumstances, *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465, 472 (N. D. Ill. 1967), where the class action procedure was peculiarly appropriate and there was no serious objection to notice by publication such as exists in cases where the interests represented so vary that individual notice is required by due process. *See, Eisen* v. *Carlisle & Jacquelin* [1968 TRADE CASES ¶ 72,381], 391 F. 2d 555, 569-70 (2d Cir. 1968).

~~For~~ the foregoing reasons, this cause qualifies as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the plaintiff class as herein identified must be provided with adequate notice as herein defined. An appropriate order will enter.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 222

CHARLES BAKER, ET AL.,
Petitioners,

vs.

F & F INVESTMENT CO., ET AL.,
Respondents.

SIDNEY CLARK, ET AL.,
Petitioners,

vs.

UNIVERSAL BUILDERS, INC., ET AL.,
Respondents.

BRIEF OF RESPONDENTS UNIVERSAL BUILDERS, INC., et al., IN OPPOSITION TO THE PETITION OF PLAINTIFFS-APPELLEES BELOW FOR WRIT OF CERTIORARI.

BURTON Y. WEITZENFELD,
LOUIS A. LEHR, JR.,
JOHN F. MCCLURE,
STANLEY M. LIPNICK,
120 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Respondents Universal Builders, Inc., et al.

ARNSTEIN, GLUCK, WEITZENFELD & MINOW,
120 South LaSalle Street,
Chicago, Illinois 60603,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1653.

CHARLES BAKER, ET AL.,

Petitioners,

vs.

F & F INVESTMENT CO., ET AL.,

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SIDNEY CLARK, ET AL.,

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vs.

UNIVERSAL BUILDERS, INC., ET AL.,

Respondents.

BRIEF OF RESPONDENTS UNIVERSAL BUILDERS, INC., et al., IN OPPOSITION TO THE PETITION OF PLAINTIFFS-APPELLEES BELOW FOR WRIT OF CERTIORARI.

The respondents here who were defendants-appellants below in *Sidney Clark, et al.* v. *Universal Builders, Inc., et al.*, oppose this petition for writ of certiorari which has been filed by plaintiffs-appellees below.

OPINIONS BELOW.

The two opinions of the District Court reported at 300 F. Supp. 210 and unofficially reported at CCH 1969 Trade Cases ¶ 72,754, and attached to the petition as Appendices B and C, respectively, were rendered in the case now known as *Charles Baker, et al.* v. *F & F Investment, et al.*, to which these respondents are not parties. The District Court orally stated that those opinions contained his reasoning applicable to these respondents.[1] A three-judge court, convened pursuant to 28 U. S. C. § 2281, rendered an unreported opinion on another aspect of this litigation, reprinted in full as Appendix C to these respondents' own petition for writ of certiorari to review the decision below, *Universal Builders, Inc., et al.* v. *Clark, et al.*, No. 1637, Oct. Term, 1969.

JURISDICTION.

This Court does not have jurisdiction to grant this petition because no petitioner and no member of the class is adversely affected by the judgment below. The court below held that none of them are barred by limitations. Hence, petitioners have no standing to appeal, and this petition does not present a "case" or "controversy" within the meaning of Article III, Section 2 of the Constitution of the United States. This jurisdictional objection is elaborated in Part I of the Argument, *infra*.

Respondents would also note an additional jurisdictional deficiency. Petitioners' application for extension of time for filing the petition, conditionally granted by Mr. Justice Marshall on April 8, 1970, should now be denied for failure to make application therefor at least ten days before the

1. Although the two cases were never consolidated in the District Court, they were then (but are no longer) assigned to the same judge.

end of the period sought to be extended, as required by this Court's Rule 34(2). The application expressly sought to extend a period ending on April 6, but was not mailed until April 1 (petition at 2, note), and no "most extraordinary circumstance" has been shown. Enforcement of this Court's Rule would render the petition out of time under 28 U. S. C. § 2101(c), which is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418 (1923).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE INVOLVED.

Respondents' objections to this Court's jurisdiction to grant this petition involve the following provisions not presented in the petition:

(1) Constitution of the United States, Article III, Section 2, Clause 1:

> The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(2) 28 U. S. C. § 2101(c), 63 Stat. 104:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of

the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(3) Rule 34(2), Rules of the Supreme Court of the United States:

> Whenever any justice of this court or the clerk is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper, an application seeking such extension must be presented to the clerk within the period sought to be extended. Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstance if filed during the last ten days of such period.

(4) Rule 23(c)(3), Federal Rules of Civil Procedure:

> The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

COUNTERSTATEMENT OF THE CASE.

Respondents incorporate by reference the Statement of the Case in their own petition in No. 1637, Oct. Term, 1969. In addition, respondents consider it essential to add the following, with regard to the proceeding below in which

they are parties, *Clark, et al.* v. *Universal Builders, Inc., et al.*:

The footnote at page 6 of this petition states that the District Court entered final orders of dismissal as to certain members of the plaintiff class. This statement is incorrect. The District Court ruled on the limitations question by denying respondents' motion to dismiss the claims of certain *named* plaintiffs (A. 76).[2] That was the *only* ruling covered by the District Court's findings authorizing interlocutory appeal under 28 U. S. C. § 1292(b)—(A. 76-77). The District Court's limitations reasoning was reflected in a simultaneous ruling permitting this action to be maintained on behalf of a class defined to exclude any persons whom the District Court thought would be barred by limitations (A. 76-77). No interlocutory appeal from the class action ruling was authorized.

Petitioners' summary of the acts which are claimed to be civil rights violations (petition at 5) makes it clear that these respondents are not alleged to have actually refused to deal with anyone because of race nor to have actually sold or offered to sell to anyone for different prices or on different terms because of race, as respondents previously noted at page 7 of their own petition in No. 1637.[3] Petitioners' summary, at page 5, of the relief they seek omits the complaint prayer for judgment "in the amount of the actual damages sustained by each of the plaintiffs and the members of the class" (A. 20).

---

2. The record below has been filed in No. 1637, Oct. Term, 1969. All references herein to that record are to the Appendix filed in the Seventh Circuit designated by the prefix "A".

3. The issue whether the complaint states a claim upon which relief may be granted was not before the Seventh Circuit.

ARGUMENT, PART I: ELABORATION OF JURISDICTIONAL DEFICIENCIES.

The Seventh Circuit's decision was rendered on interlocutory appeal from the District Court's limitations rulings *only. The District Court did not dismiss the claim of anyone on limitations grounds.* To the contrary, he denied respondents' motion to dismiss the claims of certain *named* plaintiffs whom respondents contend are barred by limitations (A. 76). Since this was the only ruling covered by the District Court's findings (A. 76-77) authorizing an interlocutory appeal under 28 U. S. C. § 1292(b), and petitioners are not adversely affected by the Seventh Circuit's judgment affirming the District Court, they have no standing to appeal. The class petitioners are authorized to represent does not include the persons whom the District Court believed barred by limitations (A. 77). This leaves petitioners devoid of authority to represent such persons as they now seek to do.

Having permitted this case to be maintained as a class action under Rule 23(b)(3), Federal Rules of Civil Procedure (petition, App. C, at App. 64), the District Court could not render an adjudication binding upon the absent "class members" without finding that notice had been given to the persons to be bound, that they are members of the class, and that they had not requested exclusion. Rule 23(c)(3), Federal Rules of Civil Procedure. No such findings were or could have been made because no notice had been given to class members when the limitations issues were decided by the District Court. Accordingly not even the persons excluded from the plaintiff class are adversely affected by the judgment below, because it is not an adjudication binding upon them, but only a legal precedent for such an adjudication in the future if they file suit (at which time they may resort to appellate procedures if they are held barred).

It is well settled that a "case" or "controversy", within the meaning of Article III, Section 2 of the Constitution, arises only when a claim is presented by a litigant having a personal stake in the outcome—someone who will personally be better off if his claim is successful. *E.g.*, *Flast* v. *Cohen*, 392 U. S. 83, 99 (1968); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 282-283 (1961); see also *Alexander* v. *Cosden Pipe Co.*, 290 U. S. 484, 487 (1934). There is nothing this Court can do for petitioners nor any member of the class defined by the District Court which will leave them better off than the Seventh Circuit's judgment that none of them are barred by limitations. Accordingly, petitioners lack standing to appeal that judgment sufficient to satisfy the Constitutional limitation upon this Court's jurisdiction.

ARGUMENT, PART II: NON-JURISDICTIONAL REASONS WHY THIS PETITION SHOULD NOT BE GRANTED.

A. Petitioners Have Not Raised a Question of Substance Under the Rules of Decision Act.

The Seventh Circuit carefully considered and followed *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914), decisions following it of the First, Second, Third, Fifth, Sixth, Seventh and Ninth Circuits (cited at 420 F. 2d at 1193-1194 and also cited in note 7, *infra*), and the general and unbroken line of this Court's decisions from *M'Cluny* v. *Silliman*, 28 U. S. (3 Pet.) 270 (1830), to *United Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966), all of which hold that, where a right of action arises under a federal statute not having a limitations provision, an appropriate forum state statute of limitations is adopted by the Rules of Decision Act, 28 U. S. C. § 1652.

Petitioners ask that *all* these decisions be overruled.

They contend (at 8-9) that the express exception in the Rules of Decision Act ("... where the Constitution ... of the United States or Acts of Congress otherwise require ...") precludes adoption of state statutes of limitations by that Act because, they argue, any requirement of timeliness is a deprivation of right. Petitioners rely solely upon the *Virginia Coupon Cases*, 114 U. S. 270 (1884), demonstrating their failure to recognize the dispositive distinction between a *complete* deprivation of *all* remedy as in *Virginia Coupon* and a requirement that available remedies be pursued within a reasonable time.

This Court has long held, contrary to petitioners' argument, that a reasonable timeliness requirement is not equivalent to a denial of right:

> "And such is the rationale of statutes of limitations. *They do not necessarily lessen rights* of property or impair the obligation of contracts. Their requirement is that the rights and obligations be asserted within a prescribed time. If that be adequate, the requirement is legal and its justice and wisdom have the testimony of the practices of the world." *Atchafalaya Land Co., Ltd.* v. *F. B. Williams Cypress Co.*, 258 U. S. 190, 197 (1922, emphasis supplied); see also *Hawkins* v. *Barney's Lessee*, 30 U. S. (5 Pet.) 457 (1831).

As these long-standing decisions hold, petitioners' contention that application of a statute of limitations equates with a denial of right is nothing new, has long since been considered and rejected by this Court, and does not now warrant review by this Court.

B. This Court Should Not Again Consider Whether Nationally Uniform Federal Substantive Rights Must Be Governed by Nationally Uniform Standards of Timeliness.

Petitioners argue (at 9-11) that a recently "expanded view" of federal law, evidenced by decisions of this Court that "many federal . . . causes of action . . . are to be governed by uniform federal rules", requires reexamination and reconsideration of whether "varying" state statutes of limitations should continue to govern the timeliness of federal actions based on Acts of Congress not having limitations provisions.[4] This argument was specifically considered and specifically rejected by this Court in *United Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 606 (1966), in which a state statute of limitations was applied to bar an action under Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185, to enforce a collective bargaining agreement.

This Court there expressly rejected a contention that the federal policy requiring nationally uniform substantive law in § 301 suits also required a nationally uniform standard of timeliness for bringing such suits, thereby precluding application of state statutes of limitations. 383 U. S. at 701-705.[5] This Court there noted the possibility of national

4. If there is a need for a uniform timeliness rule, it is strange that petitioners advocate a test of laches, which varies, not from state to state, but from case to case. *Czaplicki* v. *"S. S. Hough Silvercloud"*, 351 U. S. 525, 533 (1956); *Alsop* v. *Riker*, 155 U. S. 448, 461 (1894). The "cure" petitioners prescribe is worse than the "disease" they say exists.

5. Petitioners' attempt to distinguish away *Hoosier Cardinal* by footnoted argument (at 10) that § 301 of the Labor Management Relations Act is "merely" jurisdictional, and that the substantive law applied is state contract law, betrays their unfamiliarity with *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 456-457 (1957) in which this Court held to the contrary. Petitioners' apparent ignorance of *Lincoln Mills* is startling since it was specifically cited in *Hoosier Cardinal*.

policy being frustrated by a lack of uniformity in applying substantive law, while specifically rejecting the claim that such policy might be frustrated by a lack of uniformity in applying limitations. 383 U. S. at 701-703.

There is nothing which can be said of federal civil rights policy and the need petitioners assert for a nationally uniform standard of timeliness for asserting civil rights which was not considered and specifically rejected by this Court in *Hoosier Cardinal*. Accordingly, petitioners' reliance upon an "expanded view" of federal law and a need for "uniform federal rules" is only a rehash of an identical argument expressly rejected by this Court as late as 1966, and there is no need for this Court to consider the question again.

C. This Court Need Not Consider the Alleged Intent of the Reconstruction Congress.

Petitioners argue (at 10-11) that the draftsmen of the post-bellum civil rights acts could not have intended that federal courts "blindly" apply state limitations statutes to bar civil rights actions. This contention was made before the Seventh Circuit which responded:

> "The fact that the Civil Rights Acts grew out of the need to remedy prior abuses of state law and state officials fails to indicate that Congress intended private actions to remain ripe interminably *or that the federal courts could not be trusted to select appropriate state limitations statutes.*" 420 F. 2d at 1195. (Emphasis supplied.)[6]

6. Petitioners' reference (at 11, n.) to South Carolina's discriminatory 1865 statutes of limitations does not help them. The legislative history of the post-bellum civil rights acts does not suggest any Congressional apprehension that the Federal courts would apply to those statutes discriminatory or otherwise inappropriate state statutes of limitations.

Respondents would also note that the "relationship between Congress and the courts on the question of limitations provisions" and the related doctrine of Congressional acquiescence which this Court described in *Hoosier Cardinal*, 383 U. S. at 703-704 is fully applicable here.[7]

Accordingly, there is no merit in petitioners' contention that this Court should now examine general history of the Reconstruction period.

D. Petitioners' Construction of the Illinois Doctrine of Laches Does Not Warrant Review by This Court.

Petitioners contend (at 11) that the Seventh Circuit should have decided whether, as a matter of *state* law, limitations or laches would be applicable here, and suggest the latter (at 11, note). Respondents submit that the lower court correctly held that the choice between limitations and laches is a *federal* question (420 F. 2d at 1193, n. 3). See *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946). This alone is dispositive of this part of petitioners' argument.

Furthermore, petitioners' analysis of Illinois law is incorrect. The three decisions upon which they rely (at 11, n.) say that laches governs suits "in equity", but do

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7. Congress has not enacted a statute of limitations applicable to the civil rights statutes involved here even though state statutes of limitations have been held applicable to federal civil rights actions in, *e.g.*, *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914); *Francis* v. *Crafts*, 203 F. 2d 809 (1st Cir. 1953), cert. denied, 346 U. S. 835; *Swan* v. *Board of Higher Education*, 319 F. 2d 56 (2d Cir. 1963); *Hileman* v. *Knable*, 391 F. 2d 596 (3d Cir. 1968); *Beard* v. *Stephens*, 372 F. 2d 685 (5th Cir. 1967); *Crawford* v. *Zeitler*, 326 F. 2d 119 (6th Cir. 1964); *Smith* v. *Cremins*, 308 F. 2d 187, 98 A. L. R. 2d 1154 (9th Cir. 1962); *Wakat* v. *Harlib*, 253 F. 2d 59 (7th Cir. 1958); *Wilson* v. *Hinman*, 172 F. 2d 914 (10th Cir. 1949), cert. denied, 336 U. S. 970, rehearing denied, 337 U. S. 927, rehearing denied, 338 U. S. 953. Compare, *e.g.*, *Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U. S. 390 (1906) applying a state statute of limitations to a private antitrust suit and 15 U. S. C. § 15(b), with which Congress later indicated its desire for a federal timeliness rule for antitrust suits by enacting one.

not say *when* a suit *is* "in equity" for purposes of choosing between laches and limitations. The test to be applied when this choice must be made is the *source of the right of action*, and even an action seeking equitable relief is governed by limitations if based on a statutory right to sue; because a right *of statutory origin*, as the one asserted here, is a "civil action not otherwise provided for" within the meaning of Section 15 of the Illinois Limitations Act, now codified as 1969 Ill. Rev. Stats., Ch. 83, Par. 16. See *Parmelee* v. *Price*, 208 Ill. 544, 70 N. E. 725 (1904), where this limitations provision was applied to a creditor's bill *in equity* because the source of the right to sue was a statute. See also *Blakeslee's Warehouses* v. *City of Chicago*, 369 Ill. 480, 484, 17 N. E. 2d 1 (1938); *Lyons* v. *County of Morgan*, 313 Ill. App. 296, 40 N. E. 2d 103 (3d Dist. 1942). The cases cited by petitioners (at 11, n.) are inapplicable because they were all suits for breach of fiduciary obligations, which actions are *purely* of *equitable origin*.

For both of these reasons, petitioners' argument that laches should apply as a matter of Illinois law is without merit.

E. The Argued Applicability of the Federal Doctrine of Laches Does Not Warrant Review by This Court.

Petitioners argue (at 13-15) that, as a matter of *federal* law, laches rather than limitations must be applicable because the complaint seeks equitable relief. Petitioners rely on *Russell* v. *Todd*, 309 U. S. 280 (1940) and *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946). They are in error.

The *availability* of both legal and equitable remedies in civil rights actions (28 U. S. C. § 1343, 42 U. S. C. § 1988) renders the court's legal and equitable *jurisdiction*

concurrent, in which event the statute of limitations applicable to the legal remedy is applicable to entire action. *Cope* v. *Anderson*, 331 U. S. 461, 463-464 (1947); *Russell* v. *Todd*, *supra*, 309 U. S. at 289. This complaint prays for punitive damages (A. 20), and the petition (at 5) reaffirms the demand for this legal remedy.[8] Moreover, this rule is applicable to civil rights actions even when only equitable relief is sought. *Swan* v. *Board of Higher Education*, 319 F. 2d 56, 59n. (2d Cir. 1963), opinion by Mr. Justice Marshall while on the bench of that Court.

Accordingly, the federal doctrine of laches does not apply. This case is clearly controlled by *Cope* v. *Anderson*, 331 U. S. 461 (1947).

Petitioners also argue that laches should apply here because the five-year state statute applied by the lower courts is "short" and because, unless respondents prove actual prejudice at trial, the defense of limitations would be "arbitrary" and a "technicality, pure and simple" (petition at 15, 16). Petitioners' unsupported characterization of the five-year Illinois statute as "short" cannot withstand comparison of that period with the one-year and the six-month limitations periods which Congress itself applied to the civil rights statutes for which it did enact limitations provisions. 42 U. S. C. §§ 1986, 3612(a).

The other branch of petitioners' argument is equally untenable. The defense of limitations is *not* a "technicality", as petitioners contend, but "a meritorious defense, in itself serving a public interest", *Guaranty Trust Co. of N. Y.* v. *United States*, 304 U. S. 126, 136 (1938). Nor must respondents prove prejudice by passage of time. The

8. Respondents accept petitioners' concession (at 15) that no actual damages will be sought at trial except such sums as are contingent upon and directly result from reformation if awarded. Without that concession, the allegations of Paragraphs 15(e), (f), (g) and (h) of the complaint (A. 17-18) would constitute claims for actual damages not contingent upon reformation.

statute of limitations represents a conclusive presumption of prejudice, drawn by the legislature:

> ". . . While time is constantly destroying the evidence of rights, [statutes of limitation] supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and the antidote go together." *Wood* v. *Carpenter*, 101 U. S. 135, 25 L. ed. 807, 808 (1879).

For all of these reasons, petitioners' attempt to invoke the doctrine of laches does not warrant review by this Court.

F. This Court Should Not Consider the Construction of 42 U. S. C. § 1988 Urged by Petitioners.

This Court should not consider petitioner's argument (at 10-11) that Section 3 of the Civil Rights Act of 1866, 42 U. S. C. § 1988, prohibits application of state statutes of limitations to civil rights actions. This statute was in effect when this Court decided *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914) and when the dozens of lower court cases following it (see 420 F. 2d at 1193-1194) were decided. Thus, the doctrine of Congressional acquiescence which this Court described in *Hoosier Cardinal*, 383 U. S. at 704, is clearly applicable.[9]

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9. Nor should this Court summarily disregard *O'Sullivan* as petitioners suggest (at 13), even though the effect of 42 U. S. C. § 1988 may not have been argued. This Court has always been empowered to notice plain error not raised by the parties. See, *e.g.*, *Silber* v. *United States*, 370 U. S. 717 (1962); Rule 40 (d) (2) of this Court. If an existing federal statute precluded the result reached in *O'Sullivan*, the effect of such a statute could have been noticed to avoid plain error. *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967), upon which petitioners rely, is inapposite because it was an appeal from a state court challenging federal constitutionality of a state statute, and considerations of federal-

Moreover, Section 1988, by its express language, is inapplicable to limitations. It provides only that, in civil rights actions, existing federal law is to be used to supply remedies and punish offenses, and that, where existing federal law is deficient or not suitable, the courts are to look to existing state law for the same purposes. This statute is not concerned with the time within which the remedies it provides must be pursued. Petitioners here ask this Court to read into § 1988 something that simply is not there by arguing that application of the state statute of limitations "will bar the federal court from affording a remedy to some of the petitioners" (petition at 12), and they again confuse the total denial of a right with a reasonable limitation upon the time for its enforcement. See discussion of *Virginia Coupon* and *Atchafalaya Land*, *supra*, Part A of this Argument.

Furthermore, even if § 1988 could be said to apply to choosing an appropriate timeliness rule, the state statute of limitations would still be applicable here. There is no federal statute of limitations, and the federal doctrine of laches can not apply. Therefore, even § 1988 would require resort to the state timeliness requirement.

Nor is there any merit to petitioners' suggestion (at 12) that, under existing federal law, this action may be held subject to no requirement of timeliness. Such a contention was rejected long ago.

> "As was said by Chief Justice Marshall in Adams v. Woods, 6 U. S. 2 Cranch, 336, 342 [2, 298, 299], . . . 'This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.'" *Campbell* v. *City of Haverhill*, 155 U. S. 610, 616 (1895).

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state relations, do preclude this Court from considering such constitutional questions which were not raised before the state courts. No such considerations preclude this Court from considering unargued federal statutes when construing another federal statute.

For all of these reasons, review by this Court is not warranted.

G. Petitioners Have Not Raised Any Substantial Question Under the Fifth and Fourteenth Amendments.

Petitioners argue (at 16-17) that they could not have known they had a valid civil rights cause of action until this Court held in *Jones* v. *Mayer*, 392 U. S. 409 (1968), that state action is not an essential element of violation of 42 U. S. C. § 1982.[10] From this premise, they contend that, since this complaint was filed promptly after that decision, Fifth and Fourteenth Amendment rights of due process and equal protection would be violated if any of them are held barred by limitations.[11]

At the threshold of petitioners' argument is the tacit assumption that due process requires that no one be barred by limitations until a test case is decided by this Court upholding the particular cause of action involved. This is unsupportable. See *O'Neil* v. *Northern Colorado Irrigation Co.*, 242 U. S. 20 (1916). Nor did *Jones* v. *Mayer* reverse clear-cut prior law as petitioners' argument suggests. See 392 U. S. at 419-420, citing *United States* v. *Morris*, 125 Fed. 322 (E. D. Ark. 1903).

Finally, petitioners' contention that, until this Court decided *Jones* v. *Mayer*, they had no reason to believe they might maintain this action, is shown by this very record to be untenable as a matter of undisputed fact. The civil rights charges against respondents are made in a single count (A. 16) which *specifically alleges* that respondents:

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10. These respondents deny that the claim here states a cause of action under *Jones* v. *Mayer*, but, as previously noted, the sufficiency of the complaint was not before the Seventh Circuit.

11. Petitioners fail to recognize that the Fourteenth Amendment is inapplicable to action by a federal court under a federal statute (Rules of Decision Act). See *Detroit Bank* v. *United States*, 317 U. S. 329, 337 (1943).

> ". . . acted under color of the laws of Illinois and of its municipalities, and under color of the custom and usage of residential racial segregation alleged above. They [respondents] also made use of the laws and customs of the State of Illinois, the County of Cook and the City of Chicago. . . ." (A. 11).

While respondents believe the factual allegations do not constitute state action as a matter of law, resolution of the question is unnecessary here.[12] Petitioners' own complaint allegations of state action refute the argument they now make, that they did not file a timely suit because they believed, until this Court decided *Jones* v. *Mayer*, that state action was required.

Therefore, this petition does not present any Constitutional question, and review by this Court is not warranted.

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12. The District Court did not decide whether the allegations of state action are sufficient, considering resolution of that question unnecessary to decision of the issues then before it (A. 42, 75-76).

CONCLUSION.

This Court does not have jurisdiction to grant the petition. Even assuming jurisdiction, the petition does not raise any question of sufficient substance to warrant review by this Court. Accordingly, the petition should be denied.

Respectfully submitted,

BURTON Y. WEITZENFELD,
LOUIS A. LEHR, JR.,
JOHN F. MCCLURE,
STANLEY M. LIPNICK,
120 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Respondents Universal Builders, Inc., et al.

ARNSTEIN, GLUCK, WEITZENFELD & MINOW,
120 South LaSalle Street,
Chicago, Illinois 60603,
Of Counsel.

SUPREME COURT, U. S.

FILED

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No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1970

CHARLES BAKER, et al.,

Petitioners,

vs.

F & F INVESTMENT CO., et al.,

Respondents.

SIDNEY CLARK, et al.,

Petitioners,

vs.

UNIVERSAL BUILDERS, INC., et al.,

Respondents.

PETITIONERS' REPLY

WILLIAM R. MING, JR.
ALDUS S. MITCHELL
123 W. Madison Street
Chicago, Illinois 60602

THOMAS J. BOODELL, JR.
5757 S. Woodlawn
Chicago, Illinois 60637

THOMAS P. SULLIVAN
JOHN G. STIFLER
DAVID C. ROSTON
135 S. LaSalle Street
Chicago, Illinois 60603

Attorneys for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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PETITIONERS' REPLY

I.

RESPONDENTS' JURISDICTIONAL ARGUMENTS ARE WITHOUT MERIT.

A.

Petitioners Have Standing To Represent Those Members Of The Plaintiff Classes Whose Claims Have Been Held To Be Barred By The Statute Of Limitations.

At the heart of respondents' argument that petitioners lack standing is the assumption that the District Court's

ruling with respect to the statute of limitations does not affect any member of the plaintiff-class. This assumption has no basis in fact.

The complaint in each of these cases alleges that the action is brought pursuant to Rule 23(b)(3), on behalf of a class of similarly situated persons. The relevant allegations of the complaints are identical (B. App. 8-9; C. App. 5-6):

> "2. Plaintiffs bring this action on their own behalf and on behalf of others similarly situated in accordance with the provisions of Rule 23 of the Federal Rules of Civil Procedure. . . .
>
> "3. Each of the individual plaintiffs and each of the members of the class is a resident of Chicago, Illinois, a citizen of the United States of America, and a member of the Negro race.
>
> "4. Each of the individual plaintiffs and each of the members of the class has executed an installment contract with one of the defendants under which the plaintiffs agreed to purchase specified real property and improvements thereon in the City of Chicago, Illinois."

The complaint in *Baker* also alleges (B. App. 23):

> "13. Beginning at a date unknown to plaintiffs, but prior to January 1, 1952, and continuing until the present, the defendants individually and in conspiracy with one another, knowingly and willfully, and for the purpose of deceiving and defrauding plaintiffs and others, and of depriving plaintiffs and other members of the Negro race of their constitutional and statutory rights:
>
> > "(1) Continued and promoted the custom and usage of residential racial segregation in Chicago and environs.

"(2) Exploited the custom and usage of residential racial segregation to the detriment of plaintiffs and to the profit of defendants.

"(3) Utilized the system of state and local laws and courts to enforce and threaten to enforce the custom and usage of residential racial segregation to the detriment of plaintiffs and to the profit of defendants."

A similar allegation is found in *Clark* (C. App. 11):

"10. Beginning at a date unknown to plaintiffs, but at approximately January 1, 1958, and continuing until the present, defendants, for the purpose of deceiving and defrauding plaintiffs and other members of the Negro race of their constitutional and statutory rights:

"(a) Continued and promoted the customs and usage of residential racial segregation in Chicago and environs.

"(b) Exploited the customs and usage of residential racial segregation to the detriment of plaintiffs and to the profits of defendants.

"(c) Utilized the system of state and local laws and courts to enforce and threaten to enforce the custom and usage of residential racial segregation to the detriment of plaintiffs and to the profit of defendants.

"(d) Refused to sell housing to Negroes on the same terms and conditions that would have been available to whites."

Pursuant to the requirement of Rule 23(c), the District Court proceeded to define the classes immediately after the filing of the complaints. Prior to determining the statute of limitations defenses, the District Court defined the plaintiff class in *Baker* as those Negroes who entered into installment contracts to purchase residential real estate in

the City of Chicago from the named defendants after January 1, 1952. (App. 64; Order of March 7, 1969.) No order defining the class in *Clark* was entered until June 5, 1969. It was clearly the District Court's intention, however, to have that case governed by its opinion on the class action filed in *Baker* on March 28, 1960. Thus, the plaintiff classes were originally defined without respect to the statute of limitations. The named plaintiffs and their attorneys were authorized to represent all members of the plaintiff classes.

After determining that these cases should proceed as class actions, the District Court ruled on the motions to dismiss, which relied, in part, on the statute of limitations issues. The court ruled that the statute barred the claims of those members of the plaintiff classes whose contracts had terminated more than five years prior to the commencement of the actions. The District Court, therefore, redefined the plaintiff classes to exclude those persons whose claims were barred by the statute of limitations. (App. 29; B. App. 193; C. App. 77.) As representatives of the entire class, petitioners have standing to represent in this Court the interests of such persons as were excluded.

When this case was pending before the Court of Appeals respondents did not object to petitioners' standing, although it was the same there as here. Similarly, the Court of Appeals did not raise any question as to petitioners' standing. We submit that respondents' failure to question petitioners' standing in the Court below amounts to a waiver of any defect in this regard.

In any event, having sued for, and having been authorized to represent the plaintiff class as originally defined, petitioners have standing to represent those members of the plaintiff class whose claims have been held to be barred by the five-year statute of limitations.

B.

Rule 34(2) Of This Court Is Not Jurisdictional.

Petitioners' motion to extend time within which to file their petition for writ of certiorari to June 5, 1970, was granted by Mr. Justice Marshall. Respondents assert that this Court lacks jurisdiction since the motion was made less than 10 days prior to the date on which the time for filing a petition expired, in violation of Rule 34(2) of this Court. The view that this Court's rules are jurisdictional has been rejected by this Court in the recent holding of *Schacht v. United States*, 90 S. Ct. 1555 (1970). The ten day period in Rule 34(2) is not statutory, and was established for administrative convenience. The decision in *Schacht* states:

> "The procedural rules adopted by the court for the orderly transaction of business are not jurisdictional and can be relaxed by the court in the exercise of its discretion when the ends of justice so require. [Citing cases.]"

Respondents were not prejudiced by this minor delay. They alone petitioned the Court of Appeals for rehearing. Moreover, their time in which to file a petition for Writ of Certiorari did not expire until June 3, 1970. The respondents' challenges to the jurisdiction of this Court are invalid and should be summarily dismissed.

II.

RESPONDENTS' DETAILED SUBSTANTIVE ARGUMENT DEMONSTRATES THAT SUBSTANTIAL, NON-FRIVOLOUS ISSUES ARE PRESENTED BY THE PETITION IN THIS CASE.

The remainder of respondents' brief in opposition underscores the significance of the question presented. By

separately analyzing the statutes, history and cases which petitioners feel must be read in conjunction with one another, respondents demonstrate that petitioners present substantial questions warranting consideration by this Court. Respondents cite no new cases, but merely juggle about authorities in an attempt to justify a different conclusion. It is for precisely this reason that petitioners request that this Court examine this important issue and set forth the appropriate standards to achieve the uniformity required in civil rights actions.

Respectfully submitted,

WILLIAM R. MING, JR.
ALDUS S. MITCHELL
123 W. Madison Street
Chicago, Illinois 60602

THOMAS P. SULLIVAN
JOHN G. STIFLER
DAVID C. ROSTON
135 S. La Salle Street
Chicago, Illinois 60603

THOMAS J. BOODELL, JR.
5757 S. Woodlawn
Chicago, Illinois 60637

Attorneys for Petitioners